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o. 84-776-CFH
tatus: GRANTED

Title: Philip S. Carchman, Mercer County Prosecutor, Petitioner
v.
Richard Nash

ocketed:
ovember 5, 1984

Court: United States Court of Appeals for the Third Circuit

ide:
84-835

Counsel for petitioner: Carchman,Philip S.

Counsel for respondent: De Julio,Lois

ntry	Date	Note	Proceedings and Orders
1	Nov 5 1984	G	Petition for writ of certiorari filed.
3	Dec 3 1984		Order extending time to file response to petition until December 20, 1984.
4	Dec 17 1984		Brief of respondent Richard Nash in opposition filed.
5	Dec 17 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Dec 19 1984		DISTRIBUTED. January 11, 1985
7	Jan 14 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED. Justice Powell OUT.
8	Jan 14 1985		The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. This case is consolidated with case No. 84-835, and a total of one hour is allotted for oral argument. Justice Powell OUT. **********
9	Feb 27 1985		Joint appendix filed. VIDED.
10	Feb 27 1985		Brief of petitioner Philip S. Carchman filed. VIDED.
11	Mar 1 1985		Record filed.
12	Mar 1 1985		Certified copy of joint briefs and appendix together with partial proceedings received.
13	Mar 1 1985		Brief amicus curiae of Pennsylvania, et al. filed. VIDED.
14	Mar 8 1985	D	Motion of petitioners for divided argument filed.
15	Mar 18 1985		Motion of petitioners for divided argument DENIED. Justice Powell OUT.
16	Mar 25 1985		SET FOR ARGUMENT, Monday, April 22, 1985. This case is consolidated with case no. 84-835. (2nd case) (1 hour).
17	Mar 28 1985	G	Motion of respondent to permit John Burke III, Esquire, to present oral argument pro hac vice filed.
18	Apr 2 1985		Brief of respondent Richard Nash filed. VIDED.
19	Apr 4 1985	X	Brief amicus curiae of Univ. of VA Post-Conviction Assistance Project filed.
20	Apr 1 1985		CIRCULATED.
21	Apr 6 1985		Record filed.
22	Apr 15 1985		Motion of respondent to permit John Burke III, Esquire, to present oral argument pro hac vice GRANTED.
23	Apr 22 1985		ARGUED.

84-776

No. _____

In The

Supreme Court of the United States

October Term, 1984

—o—

PHILIP S. CARCHMAN,
Mercer County Prosecutor,

Petitioner,

v.

RICHARD NASH,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.* applies to a detainer based on a violation or probation or parole?
2. Whether the State of New Jersey complied with Article III of the Interstate Agreement on Detainers?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

1. Philip S. Carchman, Mercer County Prosecutor, Appellant
2. State of New Jersey, Department of Corrections, Intervenor
3. Richard Nash, Appellee

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No. .....

In The

Supreme Court of the United States

October Term, 1984

PHILIP S. CARCHMAN,
Mercer County Prosecutor,

Petitioner,

v.

RICHARD NASH,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

Nash v. Jeffes, 739 *F.2d* 878 (3d Cir. 1984).

Nash v. Carchman, 558 *F.Supp.* 641 (D.N.J. 1983).

State v. Richard Nash, No. C-161, (N.J. S.Ct., filed November 12, 1982).

State v. Richard Nash, No. A-778-81T4, (N.J. App. Div., filed June 22, 1982).

State v. Richard Nash, No. 495-74, (N.J. Law. Div., oral opinion delivered August 25, 1981).

Richard Nash v. Glen R. Jeffes, No. 81-401, (D.N.J., filed June 24, 1981).

Richard Nash v. Glen R. Jeffes, No. 80-0246, (M.D.Pa., filed February 3, 1981).

State v. Richard Nash, No. A-2711-76, (N.J. App. Div., filed December 11, 1978).

—o—

STATEMENT OF JURISDICTION

Petitioner Philip S. Carchman, Mercer County Prosecutor. seeks the review by writ of certiorari of the judgment of the United States Court of Appeals for the Third Circuit. The Court's opinion was filed and judgment was entered on July 10, 1984. A petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 27, 1984. The mandate was filed on September 4, 1984. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 *U.S.C.* Section 1254(1).

—o—

RELEVANT STATUTE

Interstate Agreement on Detainers, *N.J.S.A.* 2A:159 A-1 *et seq.*

(reproduced in Appendix)

—o—

STATEMENT OF THE CASE

On January 3, 1975, a Mercer County Grand Jury returned Indictment 495-74 charging Richard Nash with Breaking and Entering With Intent to Rape, *N.J.S.A.* 2A:94-1, and Assault With Intent to Rape, *N.J.S.A.* 2A:90-2.

On June 21, 1976, defendant Nash entered a *retraxit* plea of guilty to both counts of Indictment 495-74. Pursuant to a plea agreement, the State made no recommendation as to the sentence and agreed not to request that bail be increased at the time of the plea. On October 29, 1976, defendant Nash was sentenced to an aggregate term of 36 months in the Mercer County Correction Center, 24 months suspended, and two years probation.

Defendant Nash appealed to the New Jersey Superior Court, Appellate Division, on the grounds that the sentence was manifestly excessive, unduly punitive, and an abuse of the trial judge's discretion. On December 11, 1978, the Appellate Division denied Nash's appeal.

On June 13, 1978, while still serving the probationary portion of his New Jersey sentence, defendant Nash was arrested in Montgomery County, Pennsylvania for Burglary, Involuntary Deviate Sexual Intercourse, and Loitering. Subsequently, on June 21, 1978, the Mercer County Probation Department filed a detainer against defendant Nash charging him with a violation of probation.

On March 14, 1979, defendant Nash was convicted in Pennsylvania of Burglary, Involuntary Deviate Sexual Intercourse and Loitering. On July 13, 1979, the Pennsylvania court sentenced the defendant to a minimum of 5 years and a maximum of 10 years to be served at the State Correctional Institution at Dallas, Pennsylvania.

On April 13, 1979, three months before he was sentenced for his Pennsylvania convictions, defendant Nash sent a letter to the Mercer County Prosecutor's Office in which he contested the validity of his Pennsylvania convictions. Defendant Nash asked for advice in the letter as to what he should do in reference to the New Jersey probation violation detainer. However, the letter makes no specific reference to the Interstate Agreement on Detainers. On May 16, 1979, the Prosecutor's Office responded by letter to defendant Nash. The letter advised him to contact his probation officer as the Prosecutor's Office had no jurisdiction over the case at this point.

On May 17, 1979, defendant Nash wrote to the Mercer County Probation Department and requested assistance with regards to his probation violation detainer. On May 23, 1979, Probation Officer Robert Hughes responded to defendant Nash by letter. Probation Officer Hughes indicated that he had spoken with the Honorable A. Jerome Moore, J.S.C., who stated that no action could be taken on the detainer until defendant Nash was sentenced on the Pennsylvania charges. Probation Officer Hughes suggested that Nash contact the Probation Department after his Pennsylvania sentencing date.

On July 20, 1979, one week after his Pennsylvania sentencing, defendant Nash again wrote to the Mercer County Probation Department and requested that action be taken on the probation violation detainer as soon as possible. Probation Officer Judith Giordano replied by letter dated August 3, 1979, in which she stated that a hearing on the probation violation would be held as soon as an attorney from the Public Defender's Office was appointed to represent him (App. 109). She further indicated that if defendant Nash did not hear from the Public Defender's Office within one week, he should write to them. When Nash was not contacted by that office, he wrote again to Probation Officer Giordano with a copy of the letter sent to the Public Defender. Defendant Nash's two page letter once more contested the validity of his Pennsylvania conviction and only made reference to his New Jersey detainer in the last sentence.

Defendant Nash, by his own admission, received a Sentence Status Report from the Pennsylvania authorities on August 17, 1979. This report informed defendant Nash of his outstanding probation violation detainer and advised him of the proper procedure to dispose of his detainer under the Interstate Agreement on Detainers.

Defendant Nash took no action until November 5, 1979, when he sent a letter to Mr. Harold Holloway, Chief Probation Officer, requesting final disposition of the probation violation detainer pursuant to the Interstate Agreement on Detainers. On the same day, defendant Nash sent a letter to the Honorable George Y. Schoch, A.J.S.C., and enclosed a copy of his letter to Chief Probation Officer Holloway. On November 13, 1979, Judge Schoch referred defendant Nash' letters to the Mercer County Prosecutor's Office with a note suggesting that Nash was "invoking the terms of the Interstate Agreement on Detainers Act . . . "

On December 6, 1979, defendant Nash executed Form II of the Interstate Agreement on Detainers formally requesting transfer to Mercer County to dispose of the charge of probation of violation. This form was for-

warded to Mercer County along with supporting documents, including Form IV of the Interstate Agreement on Detainers, an offer by the Pennsylvania authorities to deliver temporary custody of defendant Nash to the Mercer County authorities.

On December 14, 1979, the Mercer County Prosecutor's Office responded to the request by sending Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas, Pennsylvania. This form authorized the Mercer County Sheriff's Office to take custody of defendant Nash on December 20, 1979. The Mercer County Sheriff's Officers arrived in Dallas, Pennsylvania on the appointed date but were informed for the first time that as of December 11, 1979, defendant Nash had been temporarily moved to a penal institution at Graterford, Pennsylvania.

On February 28, 1980, the Mercer County Prosecutor's Office sent another Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas, defendant Nash having been returned there on February 26, 1980. The new Form VI designated March 10, 1980 as the date when the Mercer County authorities would take custody of defendant Nash.

Defendant Nash reacted by refusing to sign the additional papers required to allow the transfer to New Jersey. Rather, on March 6, 1980, Nash filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. An amended petition was filed on December 9, 1980. Pursuant to 28 *U.S.C.* 1406, the case was transferred to the United States District Court for the District of New Jersey on February 3, 1981 (App. 101). On March 26, 1981, the Mercer County

Prosecutor's Office filed an answer to defendant Nash's habeas petition.

On June 24, 1981, the Honorable Dickinson R. Debevoise, U.S.D.J., ordered the Prosecutor's Office to provide the court with specific information regarding defendant Nash's state court remedies (App. 95). This information was provided on July 20, 1981; subsequently, on July 24, 1981, Judge Debevoise ordered that Nash's federal action be stayed until the completion of the state court proceedings available to him (App. 81).

On August 24 and 25, 1981, the Honorable Richard J.S. Barlow, Jr., J.S.C., held a hearing in which he denied defendant Nash's motion to dismiss the probation violation detainer. In addition, Judge Barlow ruled that Nash's Pennsylvania convictions constituted a violation of probation (App. 50). On October 9, 1981, defendant Nash was resentenced on Indictment 495-74 to consecutive 18 month sentences at the Mercer County Correction Center (App. 77).

Defendant Nash appealed to the New Jersey Superior Court, Appellate Division, on the grounds that the State failed to dispose of the probation violation detainer within the time limits imposed by the Interstate Agreement on Detainers. The Appellate Division denied the appeal (App. 44); a petition for certification to the New Jersey Supreme Court was denied on November 12, 1982 (App. 43).

Having fully exhausted his state remedies, defendant Nash's federal habeas proceeding was returned to the trial list. On January 4, 1983, Judge Debevoise held a hearing on the matter at the United States Court in Philadelphia.

The District Court had subject matter jurisdiction pursuant to 28 *U.S.C.* Sec. 2241 and 28 *U.S.C.* Sec. 2254. On March 7, 1983, Judge Debevoise issued his opinion granting defendant Nash's petition and declaring his conviction a nullity (App. 21). *Nash v. Carchman,* 558 *F. Supp.* 641 (D.N.J. 1983). Judge Debevoise ruled that the Interstate Agreement on Detainers extends to a probation violation detainer and, furthermore, that the State violated defendant Nash's rights under the statute. An order to this effect was entered on March 21, 1983 (App. 42).

Philip S. Carchman, Mercer County Prosecutor, appealed to the United States Court of Appeals for the Third Circuit. The State of New Jersey Department of Corrections successfuly intervened on the side of the appellant. The Circuit Court had jurisdiction to review an appeal from a final judgment pursuant to 28 *U.S.C.* Sec. 1291. The Court of Appeals affirmed the judgment on the District Court; the Court's opinion was filed and judgment was entered on July 10, 1984 (App. 1). *Nash v. Jeffes,* 739 *F.2d* 878 (3rd Cir. 1984). A petition for Rehearing and Suggestion for Rehearing In Banc was denied on August 27, 1984 (App. 103). The mandate was filed on September 4, 1984 (App. 105).

Point One: The Court Of Appeals Has Rendered A Decision In Conflict With Another Federal Court Of Appeals On The Same Matter And Creates A Conflict In The Interpretation Of A Uniform Statute.

In response to the problem of detainers lodged by authorities in one jurisdiction against prisoners incarcerated in another, the Interstate Agreement on Detainers

(IAD) was drafted to provide for a uniform and orderly system of disposing of such detainers promptly and efficiently. The IAD is a "congressionally sanctioned interstate compact the interpretation of which presents a question of federal law." *Cuyler v. Adams,* 449 *U.S.* 433, 442 (1982). In addition to having been enacted into federal law, the Act has also been adopted by forty-eight states and the District of Columbia.

It is provided in Article III of the IAD that:

> [w]henever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any *untried indictment, information or complaint on the basis of which a detainer has been lodged* against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint. . .

N.J.S.A. 2A:159A-3(a) (emphasis added).

The Court of Appeals held that a detainer based on a violation of a probation or parole is within the scope of Article III. The Court found support for this interpretation in the legislative history of the Act, specifically, the comments made by the Council of State Governments when it included the IAD in its suggested State Legislation Program in 1957. Secondly, the Court used a cost-benefit analysis to conclude, as a matter of policy, that a prisoner's interest in rehabilitation outweighs any administrative burdens caused by such an expansive reading of the Act.

This decision directly conflicts with the decision of the United States Court of Appeals for the Ninth Circuit in ***Hopper v. United States Parole Com'n.***, 702 ***F.2d*** 842 (9th Cir. 1983).

In *Hopper,* the Court dealt with a situation in which the United States Parole Commission (USPC) lodged a detainer against a California prisoner for violation of parole.[1] In March 1981, the prisoner requested a transfer to federal custody for parole revocation hearing. When the hearing had not taken place by December 1981, the prisoner filed a habeas corpus petition alleging, ***inter alia,*** that the parole revocation charge must be dismissed due to a lack of a timely hearing as required by the IAD. The Ninth Circuit rejected this argument and held "that an unadjudicated parole violator warrant is not a 'complaint' within the meaning of article III of the IADA. . . ." 702 *F.2d* at 846.

The court in *Hopper* reached its conclusion by analyzing the IAD's Congressional legislative history. A detainer was defined as a "notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." 1970 *U.S. Code Cong. & Ad. News* 4864, 4865. Congress referred to prisoners "convicted on

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1. Hopper deals with a parole violation detainer as opposed to a probation violation detainer. Although the detainer lodged against defendant Nash was based on a violation of probation, in this context there is no distinction between the two. Indeed, both the District Court and Circuit Court opinions speak of parole violation detainers as well as those based on violations of probation. The ruling as to parole violation detainers was the basis for intervention by the State of New Jersey Department of Corrections.

the new charges," *Id.* at 4865, the "threat of another prosecution," 116 *Cong. Rec.* 38840, and a "request [for] trial," *Id.* at 38841. The Ninth Circuit reasoned that the phrase "untried indictment, information or complaint" was thus "used in its more technical form and was not intended to include unadjudicated parole violator's warrants." 702 *F.2d* at 846.

The court in *Hopper* was further persuaded by Congress' concern with Supreme Court decisions dealing with a prisoner's speedy trial rights. Both the House and Senate Judiciary Committee Reports and Senator Hruska's comments on the Senate floor refer to *Smith v. Hooey,* 393 U.S. 374 (1969), which held that a prisoner charged with a new offense has a right to a speedy trial and that the State must make a good faith effort to bring the defendant to trial within a reasonable time, even if he is serving a sentence outside the State. "Thus . . ., Congress was addressing outstanding criminal complaints against prisoner, and not outstanding parole violator warrants." 702 *F.2d* at 846.

In addition to the obvious confusion caused by conflicting decisions by federal courts of appeals, the problem is especially acute when the conflict concerns the interpretation of an interstate compact. The Act is used as a mechanism for the orderly transfer of prisoners from one jurisdiction to another to dispose of certain detainers. Not only will prisoners incarcerated within the jurisdiction of the Third Circuit have broader rights under the Act than those incarcerated within the jurisdiction of the Ninth Circuit, but prison officials charged with the administration of the Act will be uncertain as to whether

or not a particular prisoner request to dispose of a probation or parole violation detainer must be honored.

The problem is further exacerbated by the fact that every state court that has addressed the issue has concluded that probation and parole violation detainers are beyond the scope of the Act. *Sable v. Ohio,* 439 *F.Supp.* 905 (W.D. Okla. 1981); *Hernandez v. United States,* 527 *F. Supp.* 83 (W.D. Okla. 1972); *Cart v. DeRobertis,* 453 *N. E.2d* 153 (Ill. App. 1983); *Padilla v. Arkansas,* CR 83-46, filed April 18, 1983, — *S.W.2d* — (Ark. 1983); *Maggard v. Wainwright,* 411 *So.2d* 200 (Fla. App. 1982); *Wainwright v. Evans,* 403 *So.2d* 1123 (Fla. App. 1981); *Irby v. State of Mo.,* 427 *So.2d* 367 (Fla. App. 1983); *Suggs v. Hopper,* 215 *S.E.2d* 246 (Ga. 1975); *Buchanan v. Michigan Department of Corrections,* 212 *N.W.2d* 745 (Mich. App. 1973); *People v. Batalias,* 316 *N.Y.S.2d* 245 (1970); *People ex rel. Capalongo v. Howard,* 453 *N.Y.S.2d* 45 (App. Div. 1982); *State v. Knowles,* 270 *N.E.2d* 133 (S.C. 1980); *Blackwell v. State,* 546 *S.W.2d* 828 (Tenn. App. 1976).

In reaching a contrary decision, the Circuit Court has created a conflict in the interpretation of a uniform statute. Indeed, in *Irby v. State of Mo.,* 427 *So.2d* 367, (Fla. App. 1983) the Florida Second District Court of Appeals reversed itself and adopted the majority view precisely to avoid such a conflict. In *Gaddy v. Turner,* 376 *So.2d* 1225 (Fla. App. 1979), the court had originally held that the IAD applied to probation violation detainers. It subsequently became aware, however, that "serious problems . . . may occur as a result of disparate interpretations of this uniform law." *Irby v. State of Mo.,* 427 *So.2d* at 368. The court was particularly concerned about a situation in which a foreign state may not realize the need to respond

timely when a Florida prisoner seeks to dispose of a probation or parole detainer lodged by the foreign state. Conversely, a foreign state might ignore Florida's request to return a foreign prisoner to resolve a Florida probation or parole detainer on the belief that the IAD is not applicable. 427 *So.2d* at 368, n.2.

Similar concerns are present here. The ruling of the panel conflicts with a ruling of the Ninth Circuit and is at odds with every other state and federal court which has addressed the issue. Forty-eight states, the federal government and the District of Columbia are signatories to the IAD. The Circuit Court's decision will disrupt the uniform administration of the Act and will introduce uncertainty into this hitherto uniform area of the law. In view of the enormous impact the panel's decision will have, petitioner respectfully requests the Court to review the judgment of the Court of Appeals by writ of certiorari.

Point Two: The Circuit Court Erroneously Interpreted The Legislative History Of The Interstate Agreement On Detainers.

In deciding that the phrase "untried indictment, information or complaint" as used in Article III of the IAD included a violation of probation or parole, the Circuit Court and District Court both relied heavily on the comments of the Council of State Governments which drafted the Act in 1956. Central to the District Court's reasoning, which the Circuit Court found "persuasive," was the Council's statement that:

> detainers may be placed by various authorities under varying circumstances, for example, when an escaped prisoner or *a parolee commits a new crime and is imprisoned in another state.*

Council of State Governments, Suggested State Legislation for 1957 at 74. 558 *F.Supp* at 645 (emphasis added by District Court). This language, coupled with the assumption that a detainer based on a probation or parole violation will have the same adverse effects on a prisoner's rehabilitation as any other detainer, led the Circuit and District Courts to conclude the Act was intended to apply to detainers based on probation or parole violation detainers.

This reasoning, however, misinterprets the comments of the Council and the effect of a detainer based on a violation of probation or parole, and ignores the plain language of the statute itself. The commentary relied upon by the District Court is not a description of the type of detainer to which the Council expected the IAD to apply. Rather, it is a statement contained in a longer paragraph that gives a general definition of a "detainer:"

> A detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer. Wardens of institutions holding men who have detainers on them invariably recognize these warrants and notify the authorities placing them of the impending release of the prisoner. Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or a parolee commits a new crime and is imprisoned in another state; or where a man not previously imprisoned commits a series of crimes in different jurisdictions.

The above paragraph aptly defines a "detainer," a definition that obviously encompasses a warrant based on a charge of violation of probation or parole. However, Article III of the IAD does not apply to all detainers; rather, by its express terms, the IAD is limited to "any

untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner . . . " *N.J.S.A.* 2A:159A-3. If this commentary was meant to describe the scope of Article III, the statute itself would have simply referred to "detainers."

The council had good reason to limit the scope of Article III. A detainer based on a violation of probation or parole will not produce the same anxieties and uncertainties that a detainer based on an untried indictment, information or complaint will produce. In the present case, given his Pennsylvania convictions, defendant Nash could hardly have been uncertain as to his probationary status. Since a probation violation is conclusively established when the probationer is convicted of subsequent crimes, *State v. Zachowski*, 53 *N.J. Super* 431, 441-42 (App. Div. 1959), the probation violation detainer could not have produced any uncertainty that would have interfered with defendant Nash's rehabilitative prospects. Defendant Nash had no reasonable expectation that the probation violation charge would be resolved in his favor. If the defendant had been returned to New Jersey immediately to resolve the probation violation issue, he would have been returned to Pennsylvania after being resentenced on the violation. A detainer would still have been lodged against him.

Moreover, the Circuit Court felt that in a "significant number" of cases, the probation violation charged lodged against the prisoner incarcerated out-of-state would be based not on the new conviction, but rather upon technical, non-criminal violations of the prisoner's probation agreement. 739 *F.2d* at 882 n.7. However, if a defendant is incarcerated in another state, the probation or parole vio-

lation detainer will always be based on the new conviction in that state.

The Circuit Court's analysis also ignored the plain language of Article III itself. Article III of the IAD, by its own terms, does not apply to all detainers lodged against a prisoner; rather it only applies to those detainers based on an "untried indictment, information or complaint." In *People ex rel. Capalongo v. Howard,* 453 *N.Y.S. 2d* 45 (App. Div. 1982), the court dealt with a prisoner who invoked the Interstate Agreement on Detainers for a warrant predicated on a violation of probation. In holding that the IAD was inapplicable, the court reasoned that "the violation merely results in resentencing, and does not constitute a new complaint." 453 *N.Y.S. 2d* at 47. Similarly, in *Blackwell v. State,* 546 *S.W. 2d* 828 (Tenn. App. 1976), the court ruled that the IAD does not extend to probation violation warrants because

> [t]he term "untried" refers to matters which can be brought to a full trial. In a probation revocation proceeding the trial has already been held, and the defendant has been convicted. In such a hearing, the defendant comes before the court in a completely different posture then he does at his trial before conviction.

546 *S.W. 2d* at 829. *Accord: People v. Jackson,* 626 *P.2d* 723 (Colo. App. 1981); *Maggard v. Wainwright,* 411 *So.2d* 200 (Fla. App. 1982).

The fact that article III of the IAD uses the adjective "untried" to modify the words "indictment, information or complaint" was central to the Arkansas Supreme Court's holding that a probation violation detainer is not covered by the IAD. In *Padilla v. Arknasas,* — *S.W. 2d* — (Ark.

1983), the court reasoned that "[a] charge against a defendant does not remain 'untried' after a defendant has pleaded guilty . . . . Since Appellant had entered a plea of guilty on the charges underlying the original sentence of probation, there was nothing 'untried' within the meaning of the [IAD] . . . "—*S.W. 2d* at —, slip op. at 3. Likewise, in *Suggs v. Hopper,* 215 *S.E. 2d* 246 (Ga. 1975), the Georgia Supreme Court refused to extend the IAD to probation violations since "[t]he purpose of the statute is to insure speedy trial on pending charges before staleness and difficulty of proof set in. These are pretrial and not sentencing considerations." 215 *S.E. 2d* at 247.

The District Court found that the phrase "charges outstanding against a prisoner," as used in article I, is broad enough to encompass a probation violation charge. However, a prisoner requesting a final disposition of an outstanding detainer pursuant to the IAD moves under article III. This article, setting forth the substantive provisions of the Act, refers only a detainer based on an "untried indictment, information or complaint." Extending article III to cover detainers based on violations of probation is a substantive change in the law that should come from the legislature. In *People ex rel. Capalongo v. Howard,* 453 *N.Y.S. 2d* 45, the court "recognize[d] that the statute commands a liberal construction . . ., but a judicially created extension to include probation violations extends the scope beyond mere liberal construction . . . Substantive changes should await legislation by the signatory States . . . " 453 *N.Y.S. 2d at* 46-47.

Significantly, one state, Kentucky, has amended its version of the IAD to specifically provide for coverage of detainers based on violations of probation and parole.

Kentucky Revised Statutes Section 440.455(2) provides that

> [a]ll provisions and procedures of [the Kentucky IAD] shall be construed to apply to any and all detainers based on unheard, undisposed of, or unresolved affidavits and warrants charging violations of the terms of probation and parole.

A request to dispose of a detainer pursuant to the IAD is made under article III. The article refers only to "untried indictments, informations or complaints." The scope of the statute should be limited to the language employed by the legislature. "[A]ny extension of the coverage of the IAD is not a matter for the judiciary, but rather, falls within the province of the legislative branch, as exemplified by Kentucky's specific amendments to its law to accomplish the desired purposes." *Maggard v. Wainwright,* 411 *So.2d* at 202.

The limiting language of Article III demonstrates that the drafters of the IAD were aware of the qualitative differences between detainers based on "untried indictments, informations or complaints" and those based on violations of probation or parole. The former implicate genuine concerns about speedy trial rights, anxieties over final adjudication of guilt or innocence, and uncertainties concerning a prisoner's release date, which will interfere with the rehabilitative process. No such problems are raised by the latter.

Point Three: The State Of New Jersey Fully Complied With The Provisions Of Article III Of The Interstate Agreement On Detainers.

The provisions of article III of the Interstate Agreement on Detainers are not self-executing. A prisoner who

seeks to invoke the statute must follow certain procedures. Article III provides that a prisoner must be brought to trial within 180 days

> after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint . . .

N.J.S.A. 2A:159A-3(a).

Article III further provides that the official having custody of the prisoner shall inform him of any detainer lodged against him and of his right to request a final disposition, he must notify the official having custody over him. *N.J.S.A.* 2A:159A-3(b). The official having custody of the prisoner shall then notify the appropriate prosecuting officers and courts. *N.J.S.A.* 2A:159A-3(d). Such notification consists of copies of the prisoner's written notice, request and a certificate from the custodian stating the term of commitment under which the prisoner is being held, the time served, the amount of good time earned, and parole eligibility. *N.J.S.A.* 2A:159A-3(a); 2A:159A-3(d).

The formal notice requirements of the IAD enable law enforcement officials to have sufficient time to arrange for the transfer of prisoners to foreign jurisdictions within the narrow time limits set in Article III. As the Circuit Court recognized, technical compliance with the formal notice requirements of Article III is necessary for the efficient administration of the Act. *Nash v. Jeffes,* 739 *F.2d* at 884.

In this case, defendant Nash compiled with the formal notice requirements on December 6, 1979. Arrangements

were made for a transfer of custody to take place on December 20, 1979. The speed with which the transfer was arranged only highlights the fact that the proper administration of the Act depends on technical compliance with its notice provisions. The transfer did not take place on December 20 because Nash had been temporarily transferred to another prison in Pennsylvania.

The Circuit Court noted that Nash's transfer within the Pennsylvania correctional system does not excuse the State from the 180 day requirement of Article III, for "[h]ad the New Jersey authorities acted in a timely manner in August, Nash's transfer from the Dallas Prison to Graterford would not have delayed the adjudication of the probation violation charge." *Nash v. Jeffes,* 739 ***F.2d*** at 885, N.13. Assuming, however, that the 180 day period began to run in August, the State did in fact act timely. The State arranged for a transfer to take place on December 20, well within the 180 day period. The officers who arrived at Dallas Prison to take custody of Nash on December 20 learned for the first time that Nash had been transferred to Graterford Prison. Given that the officers possessed a writ for Nash issued to the warden of the Dallas Prison, they had no authority to proceed to Graterford Prison to take custody of him there. Nash's transfer, therefore, was directly responsible for the detainer not being disposed of within 180 days. The State had acted timely on seeking custody of Nash in order to dispose of the detainer.

Defendant Nash was not entitled to rely on the August 3, 1979 letter from the Probation Department as justification for failing to follow the required procedures. The letter advised Nash that a hearing would be held when

an attorney had been appointed to represent him. The letter also suggested that Nash contact the New Jersey Public Defender's Office if he did not hear from them within one week (App. 109). Nash did not contact the Public Defender's Office concerning legal representation. Rather, he once again wrote to Probation Officer Giordano, discussed the perceived injustice of his Pennsylvania conviction for almost the entire letter, and mentioned his detainer only in the last sentence. Nash did not take any further action for several months. At the time of the August 3 letter, proper notice had not been given to the Prosecutor's Office or the appropriate court.

The Circuit Court recognized that a prisoner must strictly comply with the IAD's notice provisions, and will be excused only when the failure to comply was the fault of one of the jurisdictions involved. *Nash v. Jeffes,* 739 *F.2d* at 884. The failure to comply with the Act's notice provisions in this case was strictly the fault of defendant Nash. Instead of using the proper forms, he sent several letters which made only scant mention of his probation violation detainer. He ignored the Probation Officer's suggestion to contact the Public Defender's Office regarding legal representation. He refused to consent to a transfer of custody on February 28, 1980.

The State submits that the 180 day period began to run on December 6, 1979, when Nash finally decided to comply with the Act's notice provisions. His subsequent refusal on February 28, 1980 to consent to a transfer of custody prevented his detainer from being disposed of within the 180 day period. *Nash v. Jeffes,* 739 ***F.2d*** at 885 (Judge Dumbauld dissenting).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests the Court to review the judgment of the Court of Appeals by writ of certiorari.

PHILIP S. CARCHMAN
Mercer County Prosecutor

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-5261

RICHARD NASH,

Appellee,

v.

GLEN R. JEFFES, Superintendent,
State Correctional Institute at Dallas,
PHILIP S. CARCHMAN,
Mercer County Prosecutor,

Appellant

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,

Intervenor

On Appeal from the United States
District Court for the
District of New Jersey
(D.C. Civ. No. 81-00401)

Argued January 26, 1984

Before: GIBBONS and BECKER, *Circuit Judges*,
and DUMBAULD, *District Judge**

(Filed July 10, 1984)

JOSEPH H. RODRIGUEZ
Public Defender
JOHN BURKE III (Argued)
Assistant Deputy Public Defender
20 Evergreen Place, First Floor
East Orange, NJ 07018

Attorneys for Appellee

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* Honorable Edward Dumbauld, Senior Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

PHILIP S. CARCHMAN
Mercer County Prosecutor
WILLIAM J. FLANAGAN (Argued)
Assistant Prosecutor
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Broad and Market Streets
Trenton, NJ 08625

Attorneys for Appellant

IRWIN I. KIMMELMAN
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Assistant Attorney General
CATHERINE M. BROWN (Argued)
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Trenton, NJ 08625

Attorneys for Intervenor

OPINION OF THE COURT

BECKER, *Circuit Judge.*

This appeal presents two questions concerning the application of the Interstate Agreement on Detainers (the "IAD").[1] The first question is whether the IAD

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1. The IAD is a compact among forty-eight of the states, the District of Columbia, and the federal government, concerning the procedures to be followed when one jurisdiction files a detainer against a prisoner being held by another jurisdiction. *See* 18 U.S.C. Appendix; N.J. Stat. Ann. § 2A.159A-1 *et seq.* (West 19—); 42 Pa. Cons. Stat. Ann. § 9101 *et. seq.* For purposes of application in federal habeas corpus proceedings and interpretation, the IAD is a federal law. *See* Cuyler v. Adams, 449 U.S. 433, 438 (1981).

applies to a detainer based on a charge that a prisoner violated his probation. The second question is whether New Jersey, the state that filed the detainer, forfeited its right to insist on compliance with the standard procedures for requesting disposition of the charge underlying a detainer because its probation department advised the prisoner, who had informally requested that the charge be adjudicated, that a hearing would be held on the outstanding charge as soon as an attorney could be appointed for him.

Appellee Richard Nash filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey, claiming that his probation violation hearing, at which he was sentenced to prison, was held in violation of Article III of the IAD. Article III requires that, when a jurisdiction that has ratified the IAD receives a request from a defendant incarcerated in another jurisdiction to adjudicate any "untried indictment, information, or complaint" on the basis of which a detainer has been filed, the adjudication must take place within 180 days, or the charge must be dismissed. It also lays down certain requirements for requests for disposition of detainers. In spite of the great weight of authority holding that Article III did not apply to detainers based on probation violations, the district court held that it applied, and that a letter sent by Nash to the appropriate New Jersey authorities before he was sentenced in Pennsylvania constituted a request for disposition of the probation violation charge. Since the letter had been sent before Nash was sentenced in Pennsylvania, the court concluded that the 180-day period began to run on the sentencing date, July 13, 1979. Because the hearing on Nash's probation violation was not held within 180 days,

the court held that New Jersey had failed to comply with Article III and therefore granted the writ. We agree substantially with the district court's conclusions, although we disagree with its exact calculation of the date on which the 180-day period began to run. This disagreement, however, has no affect on the outcome, and we therefore affirm.

I.

On June 21, 1976, Nash pled guilty to breaking and entering with intent to rape in Mercer County, New Jersey. On October 29 of that year, he was sentenced to three years in prison, two of which were suspended, and to two years probation to follow. On June 13, 1978, while on probation, Nash was arrested in Montgomery County, Pennsylvania, for burglary, involuntary deviate sexual assault, and loitering. Eight days later the Mercer County Probation Department lodged a detainer against Nash, charging him with violating his probation.

Nash was convicted in Pennsylvania on March 14, 1979. On April 13, Nash sent a letter to the Mercer County Prosecutor's Office, requesting assistance with the detainer filed against him. The prosecutor responded on May 16, recommending that Nash contact his probation officer. On May 17, Nash wrote a letter to his probation officer, in which he stated that "[w]hatever you can do with respect to lifting the [d]etainer, would be greatly appreciated." On May 23, the probation office responded that, on the advice of Judge A. Jerome Moore, the criminal assignment judge, no further action would be taken until after Nash was sentenced in Pennsylvania.

Nash was sentenced in Montgomery County on July 13, 1979. Seven days later, he again wrote to his proba-

tion officer, referring to his May 17 letter and also restating his contention that the Montgomery County conviction was improper. On August 3, the probation office responded, informing Nash that a hearing would be held as soon as he was assigned a public defender. On that basis, Nash evidently concluded that Mercer County would proceed with the disposition of the detainer. When Nash received his "Sentence Status Report" on August 17, which advised him of the proper procedure for disposing of the detainer, he took no action.

On November 5, 1979, Nash again wrote to the probation department requesting final disposition of the probation violation detainer. He also sent a copy to Judge George Y. Schoch of the New Jersey Superior Court, who referred the letter to the prosecutor's office eight days later with a note suggesting that Nash "was invoking the terms of the [IAD]." The authorities then began to implement the IAD procedures. Nash executed the IAD "Form II", which was forwarded to Mercer County along with "Form IV" from the Pennsylvania authorities. Mercer County then returned a "Form VI" to the State Correctional institution at Dallas, Pennsylvania, where Nash was confined, authorizing the Mercer County Sheriff's Office to obtain custody of Nash. On December 20, 1979, the Sheriff's officers arrived in Dallas to obtain Nash, only to find that he had been temporarily transferred to the Graterford Prison. Rather than seeking to obtain Nash from Graterford, Mercer County waited until Nash returned to Dallas to attempt to obtain custody.

Nash returned to Dallas on February 26, 1980, and a second "Form VI" was sent two days later. Nash refused to sign the papers necessary to transfer custody,

however, and on March 6 filed a petitioned for a writ of habeas corpus in the District Court for the Middle District of Pennsylvania. The case was transferred to the District of New Jersey, pursuant to 28 U.S.C. § 1406, on February 3, 1981.[2] On July 24, 1981, after obtaining information concerning Nash's state court remedies from the Mercer County Prosecutor's Office, the district court stayed Nash's federal action pending exhaustion of his state court remedies. Nash then petitioned for habeas corpus in state court. Judge Richard J.S. Barlow of the New Jersey Superior Court denied Nash's motion to dismiss the probation violation charge on the basis of Article III, held that his Pennsylvania convictions constituted a probation violation, and re-sentenced him to consecutive eighteen-month sentences on his New Jersey convictions. The appellate division rejected Nash's appeal based on the failure of Mercer County to observe the time limits of Article III of the IAD, and the New Jersey Supreme Court denied certification.

Nash then returned to federal court. The district court held a hearing on January 4, 1983. On March 21, the court filed an opinion granting the writ of habeas corpus. *Nash v. Carchman*, 558 F. Supp. 641 (D.N.J. 1983). As we have noted, the court held that Article III of the IAD applies to detainers based on probation violations. The court reasoned that one of the purposes of the IAD, disposing of outstanding charges expeditiously to protect prisoners, covered detainers based on probation

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2. In the interim, Nash had amended his petition a number of times, had filed a habeas corpus petition in New Jersey Superior Court which was rejected by Judge Schoch, and had re-filed his federal habeas corpus petition in the Middle District of Pennsylvania.

violation charges. The court buttressed its reasoning with citations to the legislative history, particularly that of the Council of State Governments which drafted the IAD. The court also determined that Nash's failure to comply with the technical provisions of Article III for demanding disposition of the outstanding charge was attributable to "bad advice" which Nash received from the New Jersey authorities in response to his April 13, 1979 letter. The court then held that, in light of their responsibility, New Jersey could not rely on this failure, and that therefore the 180-day period for disposition of the probation violation charge began running on the date Nash was sentenced, July 13, 1979.[3] The Mercer County Prosecutor appealed. The State of New Jersey, Department of Corrections, pursuant to leave of this court, has intervened on the side of the prosecutor.

II.

Article III states in relevant part:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprsionment there is pending in any other party State any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have

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3. Under the terms of Article III, the 180-day period cannot begin running until the prisoner "has entered upon a term of imprisonment . . . ." The district court held that, in light of this language, the 180-day period could not begin running until Nash was sentenced. In light of our conclusion that the period began running after July 13, 1979, see *infra* part III, we have no reason to review this aspect of the district court's holding.

> caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint . . . .

N.J. Stat. Ann. § 2A:159A-3(a) (emphasis added). The primary question before us is whether a detainer based on a probation violation is "an untried indictment, information, or complaint," and thus covered by Article III of the IAD.

Other than the district court in this case, there is only one reported decision which applies Article III in this context. *Gaddy v. Turner,* 376 So.2d 1225 (Fla. App. 1979). The same court later reversed itself in the interest of uniformity. *Irby v. Missouri,* 427 So.2d 367 (Fla. App. 1983). Otherwise, the courts which have decided the issue are unanimous in holding that Article III does not apply where the detainer is based on a parole or probation violation.[4] The analysis of the district court in this case, however, is considerably more comprehensive than that of any of the courts which have dealt with the issue previously. Although the authority on the other side is entitled to considerable weight, the strength of the district court's analysis far exceeds that of the opinions reaching the opposite result.

4. See Hopper v. United States Parole Comm'n, 702 F.2d 842 (9th Cir. 1983); Hernandez v. United States, 527 F. Supp. 83 (W.D. Okla. 1981); Sable v. Ohio, 439 F. Supp. 905 (W. D. Okla. 1977); Padilla v. Arkansas, — S.W.2d — (Ark. 1983); People v. Jackson, 626 P.2d 723 (Colo. App. 1981); Maggard v. Wainwright, 411 So.2d 200 (Fla. App. 1982); Wainwright v. Evans, 403 So.2d 1123 (Fla. App. 1981); Suggs v. Hopper, 215 S.E.2d 246 (Ga. 1975); Buchanan v. Michigan Department of Corrections, 212 N.W.2d 745 (Mich. App. 1973); People *ex rel.* Capalongo v. Howard, — App. Div. 2d —, 453 N.Y.S.2d 45 (1982); People v. Batalias, — App. Div. 2d —, 316 N.Y.W.2d 245 (1970); State v. Knowles, 270 S.E.2d 133 (S.C. 1980); Blackwell v. State, 546 S.W.2d 828 (Tenn. App. 1976).

In *Hopper v. United States Parole Commission,* 702 F.2d 842 (9th Cir. 1983), the court held that an unadjudicated parole violation is not an "untried complaint." The court looked to the use of terms in the legislative history, which indicated to it that the relevant phrase in Article III should be given a "technical" interpretation, and held that Congress in adopting the IAD used "untried indictment, information, or complaint" in the technical sense of an unprosecuted accusation of a new offense. 702 F.2d at 846. Some of the other courts that have reached this result also relied on a technical interpretation of the language,[5] while others have relied on administrative concerns[6] or the indications in the legislative history that Article III is primarily concerned with the "speedy trial" rights of prisoners—a concern not usually relevant when probation violations are involved.[7]

5. See State v. Knowles, 270 S.E.2d 133 (S.C. 1980); Suggs v. Hopper, 215 S.E.2d 246 (Ga. 1975); Blackwell v. State, 546 s.w.2D 828 (Tenn. App. 1976).

6. See Suggs v. Hopper, 215 S.E.2d 246 (Ga. 1975); Irby v. Missouri, 427 So.2d 1123 (Fla. App. 1983); Wainwright v. Evans, 403 So.2d 1123 (Fla. App. 1981).

7. See People v. Jackson, 626 P.2d 723 (Colo. App. 1981). Where a probation violation charge is based on a conviction in another state, delay will generally pose little risk to the prisoner's opportunity for a fair adjudication of the charge, since the conviction itself will be conclusive proof of the probation violation. Where the charge is based on another type of violation, such as a non-criminal act which is prohibited by the terms of probation, on which evidence such as live testimony may be relevant, the prisoner's opportunity for a fair adjudication may be compromised by

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The district court, on the other hand, looked at the broader purposes of the legislation. The court cited legislative history for the proposition that, in addition to the speedy trial rights of prisoners, the drafters of Article III were concerned with the need to settle outstanding charges against prisoners, in order to enable the prisoners to participate in rehabilitative programs. In advancing this proposition, the district court relied heavily on the most important legislative history of the IAD, the statements of the Council of State Governments which drafted it in 1956. These statements, in describing the problems that created the need for the statutes, point to the detrimental effect of an outstanding detainer on the prisoner's abiliy to be rehabilitated, a concern which is equally applicable whether the detainer is based on a pending indictment for a new crime or a probation violation charge. As one commentator has summed it up:

> The thrust of [the IAD] is not to protect the convict's right to a speedy trial per se, but rather to protect him from the particular disabilities engendered by an untried detainer pending against him while he is serving a prison term. Often the effect of such a detainer, which could be based upon an unsubstantiated charge, is to aggravate the punishment received for the original offense.

Note, *The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rutgers L. Rev. 828, 832 (1964) (footnote omitted).

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delay. Although there is no constitutional right to a speedy adjudication in probation violation cases, we believe that concern for a fair adjudication, as well as concern for constitutional rights, should inform our interpretation of the IAD. The concern will be relevant in a significant number of cases.

As the Eighth Circuit has noted, there are numerous consequences to a prisoner when a detainer remains outstanding against him:

> [T]he inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons (i.e., honor farms or forestry camp work); (4) ineligible for trustee status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle them to additional good time credits against their sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.

Cooper v. Lockhart, 489 F.2d 308, 314 n.10 (8th Cir. 1973). The district court took notice of these possible consequences, 558 F. Supp. at 644, and concluded that, given the "broad purposes" of the Act, it should be liberally interpreted to effect those purposes.[8]

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8. The importance of the values taken cognizance of by the district court is underscored by the recent statements of Chief Justice Burger about the deplorable state of the American prison system and the need for vastly improved programs of rehabilitation within the prisons. "[O]ne of the reasons, if not the major reason, why rehabilitation has

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We find the district court's reasoning persuasive. The legislative history cited by the dstrict court makes it clear that the consequences to a prisoner of an outstanding detainer were well known to the drafters of the IAD and the legislatures that enacted it. A quick adjudication of the charges underlying a detainer is desirable, not only to vindicate a prisoner's constitutional right to a speedy trial, but also to provide certainty as to the time of his scheduled release, in order to aid in his rehabilitation. Many prison rehabilitative programs are not open to prisoners with outstanding detainers. Although this may make sense from the perspective of the prison system, since the limited resources available for programs to prepare prisoners for freedom should not be wasted on prisoners who are not going to be released at the end of their current term, it emphasizes the importance of requiring that the charges underlying detainers be finally adjudicated at the beginning, rather than the end, of the sentence. Fairness to the prisoner and proper allocation of society's resources require that detainers be promptly removed unless the prisoner has been finally and constitutionally sentenced to further imprisonment on the basis of the charge underlying the detainer. This is true regardless of whether the detainer is based on an indictment or on a probation violation. The legislative history indicates that this was a concern of the people who drafted the IAD.

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not worked is that in most of the prisons we have not had work and training and education . . . . If they go in as functional illiterates and come out as illerates, and in the meantime have acquired this terrifying experience . . . they're going to be worse people, they're going to be back in again." Chief Justice Burger, speaking on Nightline, ABC TV, June 19, 1984.

The current national debate over the need to improve the rehabilitative functions of our prison system, *see supra* n.8, only highlights the importance of avoiding a situation in which a prisoner is denied access to rehabilitative programs because of a detainer based on charges which have not been finally adjudicated.

For these reasons, we decline to adopt a technical interpretation of the relevant language of Article III. We have considered the administrative burdens of applying Article III to probation violations.[9] One such burden is the cost of transporting prisoners in order to provide them with a probation revocation hearing.[10] Given the burdens the detainer placed on the prisoner, we do not feel that this additional expense outweighs the interest in quick adjudication.

A second burden is the additional paperwork which would be required by applying Article III to probation violations.[11] The volume of such paperwork, like the extra

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9. Although we doubt that these administrative burdens were considered by the drafters of the IAD or the legislatures which adopted it, our analysis of the legislative history is based on policy and we feel that the additional cost of expanding the scope of Article III is relevant to our policy analysis.

10. Although this is a burden which the state must ultimately assume unless the charge is dismissed, requiring adjudication before the out-of-state sentence has been served increases the cost because it requires an additional trip.

11. In the probation violation context, the notice to the prosecutor and the judge required by Article III places the appropriate officials on notice of the prisoner's request for adjudication under the IAD. We note that if this were a parole violation rather than a probation violation, the notice required by the IAD might not be appropriate to

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cost of transporting prisoners for probation violation hearings while they are still imprisoned in other states, does not outweigh the burden which a detainer placed on the prisoner. Although, as discussed below, it would be burdensome to require prosecutors and judges to scrutinize every letter from a probationer against whom a detainer was outstanding, this problem can be alleviated by requiring probationers to comply with the formal notice requirements of Article III. Therefore, we do not find that the adiminstrative burdens created by applying Article III to detainers based on probation violations outweigh the benefits to probations. In sum, we hold that a probation violation is a "complaint" within the meaning of Article III of the IAD.

III.

Appellant argues that, even if Article III applies in the probation violation context, the state complied with its requirements by providing Nash with a hearing within 180 days of the receipt of the formal request for disposition from the Pennsylvania correction authorities. Appellant argues that a series of letters that Nash sent to New Jersey officials between April 13, 1979, and July 20, 1979, did not constitute notice that he was invoking the IAD, and

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inform the state officials with jurisdiction over the outstanding charge. If so, parole violation charges might lapse without the appropriate officials receiving notice, or require the state to engage in a potentially costly re-routing of requests for adjudication of parole violation charges. We need not decide here whether this distinction is in fact valid or whether it would lead us to a different result.

thus did not trigger the 180-day period prescribed by Article III.[12]

The Courts have generally required that prisoners must strictly comply with IAD procedures before they will dismiss charges on the basis of a violation of Article III. *See Williams v. Maryland,* 445 F. Supp. 1216, 1220 (D. Md. 1978); *Gray v. Benson,* 443 F. Supp. 1284, 1286 (D. Kansas 1978); *People v. Primmer,* 54 A.D.2d 221, —, 399 N.Y.S. 2d 478, 480 (1977), *aff'd,* 46 N.Y.2d 1048, 389 N.E.2d 1070, 416 N.Y.S.2d 548 (1979); *State v. Brockington,* 89 N.J. Super. 423, 430, 215 A.2d 362, 365-66 (1965). Subsection (b) of Article III, N.J. Stat. Ann. § 2A:159A-3(b), requires that a request for disposition of charges be sent by the prisoner to his custodian, who then must forward the request to the officials of the jurisdiction that filed the detainer. This requirement is necessary, because the prosecuting authorities cannot be expected to analyze each communication from a prisoner with a fine-tooth comb to determine whether it should be construed as invoking the IAD. Routing a request for disposition through the prisoner's custodian also allows the custodian to file supporting documents contemporaneously with the request. Article III is not designed as a trap for unwary prosecuting officials, but as a systematic method of rapidly adjudicating charges against prisoners held in another jurisdiction. The technical requirements for filing

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12. If appellant is correct, Nash's refusal to cooperate with efforts to transfer custody, instituted by New Jersey on February 28, 1980, would fall within the 180-day period, and he would thus be prevented from raising his Article III claim, since the failure to hold a hearing within the the 180-day period would be attributable to him, not the state.

a request for disposition further the underlying purpose of rapid adjudication.

The district court, in finding an exception applicable to this case, relied on cases holding that where the failure to strictly comply was the fault of one of the jurisdictions involved rather than the petitioner, technical compliance will be excused. *See Schofs v. Warden, FCI, Lexington,* 509 F. Supp. 78, 82 (E.D. Ky. 1981); *United States v. Hutchins,* 489 F. Supp. 710, 714-15 (N.D. Ind. 1980). *See also Pittman v. State,* 301 A.2d 509 (Del. 1973); *State v. Wells,* 186 N.J. Super. 497, 453 A.2d 236 (App. Div. 1982). The district court held that the "misleading information" received by Nash from the New Jersey authorities in response to his April 13, 1979, letter concerning the appropriate procedures for disposition of the detainer excused his failure to comply with Article III procedures. In reaching this conclusion, the court failed to take account of the fact that, under the prevailing interpretation of the IAD, Article III did not apply to Nash's detainer. Thus, in referring Nash to his probation officer, the New Jersey authorities may well have been acting properly based on a good-faith belief that Article III did not apply to Nash's request that the probation violation charge be adjudicated.

We need not reach this question, however, because we believe that the letter of August 3, 1979, in which the probation department informed Nash that a hearing would be held as soon as an attorney could be appointed for him, constituted an acknowledgment on the part of New Jersey that Nash's letters were being treated as a request for disposition of the probation violation charge. On the basis of that letter, Nash was justified in taking no further action when, two weeks later, the Pennsylvania authorities

provided him with a "detainer procedure notice." New Jersey, rather than Nash, should bear the responsibility for the delay between August and November, when another letter from Nash to the probation department finally led to the institution of formal proceedings on the probation violation charge.[13]

IV.

We conclude that an outstanding charge of a probation violation claim is an "untried indictment, information or complaint" within the meaning of Article III of the IAD. We further hold that, under the circumstances of this case, the appellee was excused from technical compliance with the notice requirements of Article III, that the 180-day period for adjudication of the probation violation charge began running on August 3, 1979, and that therefore the charge should have been dismissed when the hearing was not held by January 30, 1980. The judgment of the district court will be affirmed.

DUMBAULD, *Senior District Judge,* concurring in part and dissenting in part.

I agree that a pending detainer charging probation violation is an "untried . . . complaint on the basis of which

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13. The fact that Nash's hearing was again delayed due to his transfer within the Pennsylvania correctional system, and that without this delay his probation violation proceeding would have fallen within the 180-day period, does not excuse New Jersey from the 180-day requirement. Had the New Jersey authorities acted in a timely manner in August, Nash's transfer from the Dallas prison to Graterford would not have delayed the adjudication of the probation violation charge. Given their failure to do so, the burden of obtaining custody of Nash from Graterford fell on the shoulders of the state officials.

a detainer has been lodged against the prisoner" within the meaning of Article III of the Interstate Agreement on Detainers, which provides for disposition within 180 days.

I disagree with part III of the majority opinion, believing that the prisoner Nash's own deliberate refusal (on February 28, 1980) to utilize the established standard procedure for disposition of interstate detainers prevented disposition of the pending charge against him within the 180-day period. He chose rather to seek federal habeas corpus on March 6th. *Exitus actum probat,* but I would uphold his New Jersey sentence for probation violation.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 83-5261

RICHARD NASH

vs.

GLEN R. JEFFES, etc.
Philip S. Carchman, etc., Appellant

(NJ D.C. Civil 81-00401)

Filed July 22, 1983

Present: GIBBONS and HUNTER, *Circuit Judges.*

1. Motion by the State of New Jersey, Department of Corrections, for leave to intervene on the side of the appellant and for an allowance of forty (40) days from the date of the Order in which to file

an appellate brief on the merits, *and* brief and appendix in support of motion,

2. Brief by appellee in opposition to motion by the State of New Jersey, Department of Corrections, for leave to intervene,

(Due 7-15-83, rec'd. 7-18-83 — not filed unless Court directs)

in the above-entitled case.

Respectfully,

(Illegible)
Deputy Clerk 7-5019

enc.
ad

The foregoing Motion is/granted.

By the Court,

/s/ John J. Gibbons
Judge

Dated: July 29, 1983 V.D.Y./cc I.I.K.
W.J.F.
R.N.
A.Z.L.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-5261

RICHARD NASH

vs.

GLEN R. JEFFES, etc.
Philip C. Carchman, etc., Appellant
State of N.J., Dept. of Corrections, Intervenor

(NJ D.C. 81-00401)

August 24, 1983

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges.*

1. Letter-request dated August 9, 1983, from John Burke, Esquire, counsel for appellee, Richard Nash, for reconsideration of this Court's order dated July 29, 1983, in which it requests that this request for reconsideration of the order be reviewed by a panel of judges other than the panel that originally decided the motion, treated as a Petition for Rehearing En Banc,

2. Copy of this Court's order dated July 29, 1983, sent by the undersigned for the Court's information, in the above-entitled case.

Respectfully,

/s/ (Illegible)
Deputy Clerk 7-5019

enc.
ad

The foregoing Motion to refer the request for reconsideration to a different panel is denied. The request for reconsideration is denied. Treating the request for reconsideration as a petition for rehearing in banc, rehearing in banc is denied.

By the Court

/s/ John J. Gibbons
Judge

Dated: September 8, 1983 V.D.Y./cc

William Flanagan, Esq.
John Burke, Esq.
Catherine M. Brown, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 81-401

RICHARD NASH,
Petitioner,

v.

PHILIP S. CARCHMAN, PROSECUTOR OF MERCER COUNTY STATE OF NEW JERSEY,
Respondent.

OPINION

(Filed March 7, 1983)

Appearances:

Joseph H. Rodriguez, Esq.
Public Defender,
Office of the Public Defender
20 Evergreen Place
East Orange, New Jersey 07018
Attorney for Petitioner.
BY: John Burke, Esq.
Assistant Deputy Public Defender
and
Ellen Shiever, Esq.
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Philip S. Carchman, Esq.
Prosecutor of Mercer County
Office of the County Prosecutor
Courthouse
P.O. Box 8068
Trenton, New Jersey 08650
BY: James A. Waldron, Jr., Esq.
Assistant Prosecutor of Mercer County

DEBEVOISE, District Judge.

Petitioner Richard Nash seeks issuance of a habeas corpus writ pursuant to 28 U.S.C. § 2254. He is serving a five to ten year sentence in the State Correctional Institution at Dallas, Pennsylvania and attacks the legality of a detainer filed against him by the State of New Jersey.

Petitioner Nash bases his argument upon the New Jersey Interstate Agreement on Detainers, N.J.S.A. 2A:159A-1 *et seq.* Under this Agreement, a prisoner may demand the speedy disposition of charges pending against him in another jurisdiction, and a member State may obtain for trial a prisoner incarcerated in another member State. *See United States v. Mauro,* 436 U.S. 340, 343 (1978). Under Article III of the Agreement, if a trial is not commenced within 180 days of an inmate's proper request, then a court in the jurisdiction where the outstanding charge is pending shall enter an order dismissing the criminal charges with prejudice. Petitioner claims that the State of New Jersey failed to dispose of the detainer lodged against the State of New Jersey failed to dispose of the detainer lodged against him within the required 180 days and therefore maintains that the state court should have dismissed both the detainer and its underlying charge and that this courts hould issue a writ of habeas corpus.

In a June 24, 1981 opinion, I determined tha petitioner had not exhausted his state remedies, and on August 3, 1981, I administratively terminated this action without prejudice to allow the petitioner to pursue his claim in the New Jersey courts.

On August 24 and 25, 1981, a hearing was held before the Honorable Richard Barlow, Jr. in the Superior Court of New Jersey. The trial judge determined that the petitioner's correspondence from April to November 1979 (the details of which are set forth below) failed to satisfy the notice requirements of N.J.S.A. 2A:159A-3 necessary to trigger the 180 day period in which a state must commence a hearing on an untried complaint.

The court concluded that the State of New Jersey was not untimely in addressing petitioner's alleged probation violation and held that the detainer against petitioner was valid. Judge Barlow found petitioner guilty of violating his probation on the basis of his Pennsylvania convictions and resentenced petitioner to serve two consecutive 18 month terms with credit for the 249 days petitioner served in 1976 and 1977.

On June 22, 1982, the Appellate Division of the Superior Court of New Jersey affirmed the trial court's judgment, and on November 12, 1982, the Supreme Court of New Jersey denied both certification and petitioner's direct appeal.

The habeas corpus petition is now before this court for a determination on the merits.

Initially, I note that both Pennsylvania and New Jersey adopted the Interstate Agreement on Detainers, 42 Pa. C.S.A. §§ 9101, *et seq.*; N.J.S.A. 2A:159A-1, *et seq.,* and that the Supreme Court in *Cuyler v. Adams,* 449 U.S. 433 (1981), held that the Agreement is a congressionally sanctioned interstate compact, the interpretation of which presents a question of federal law. *Id.* at 442. Additionally, the Third Circuit has found that an alleged violation of the Interstate Agreement on Detainers is an issue cognizable in federal habeas corpus proceedings. *Johnson v. Williams,* 666 F.2d 842, 844, n.1 (3d Cir. 1981); *United States v. Williams,* 615 F.2d 585, 590 (3d Cir. 1980).

Before I can turn to the merits of petitioner's claim, I must address the state's argument that Article III of the Agreement, N.J.S.A. 2A:159A-3, is inapplicable to a charge of parole or probation violation. Neither the Third Circuit Court of Appeals, the district courts of this circuit, nor the New Jersey courts have ever addressed this issue.

Article III states in relevant part:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there in pending in any other party State an *untried indictment, information, or complaint* on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days. . . .

N.J.S.A. 2A:159A-3(a) (emphasis added).

Although an alleged probation violation could be construed as an "untried complaint", the Interstate Agreement on Detainers does not so specify on its face.

However, Article I, the section which sets forth the Agreement's purpose, employs broad language which seems to encompass a probation violation charge. This Article provides that:

> *charges outstanding against a prisoner,* [as well as] detainers based on untried indictments, informations, or complaints . . . produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. . . .

(emphasis added). N.J.S.A. 2A:159A-1. The stated purpose of the Agreement is to dispose of outstanding charges, indictments, informations, or complaints expeditiously to protect the prisoner from the adverse consequences of detainers. N.J.S.A. 2A:159A-1; *Cuyler v. Adams,* 449 U.S. 433, 448-449 (1981); *United States v. Mauro,* 436 U.S. 340, 360 (1978). Article IX of the Interstate Agreement on Detainers directs that the Agreement should be liberally construed to effectuate these purposes. N.J.S.A. 2A:159A-9.

It appears that the stated policy behind the Agreement would apply to petitioner's outstanding detainer. A detainer based on an alleged probation violation will, of course, have the same adverse effects on an inmate as a detainer based on an untried indictment or information. The punitive consequences of detainers are generally recognized to include the following:

> the inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons (i.e., honor farms or forestry camp work); (4) ineligible for trustee status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle them to additional good time credits against their sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.

Cooper v. Lockhart, 489 F.2d 308, 314 (8th Cir. 1973). In light of the above consequences, a prisoner with any kind of outstanding detainer will be anxious to resolve the underlying charges.

The legislative history behind the Interstate Agreement on Detainers provides further support for the contention that a detainer based upon an alleged probation violation constitutes a detainer based upon an "untried indictment, information, or complaint" within the meaning of the statute.

The Interstate Agreement on Detainers, codified in New Jersey at N.J.S.A. 2A:159A-1, *et seq.,* is a compact among 48 states, the District of Columbia, and the United States. The Council of State Governments initially drafted the Agreement in 1956. The draft Agreement was reviewed and approved in April 1956 by a conference jointly sponsored by the American Correctional Association, the Council of State Governments, the National Probation and Parole Association, and the New York Joint Legislative Committee on Interstate Cooperation. Following this conference's endorsement of the Agreement, the Council of State Governments included the proposal in its suggested State Legislation Program for 1957.

The New Jersey legislative enactment of the Interstate Agreement on Detainers in 1958 contained a text identical to the 1957 proposed legislation. A sponsor's statement is the only legislative history that exists for the New Jersey Agreement. This statement provides:

> The problem of expedient disposition of detainers filed against inmates of penal or correctional institutions in this State has long been recognized. . . . This bill . . . would do much to facilitate the administration of our correctional institutions in handling cases of inmates presently restricted from parole, minimum security, work assignments, and other rehabilitative procedure.

Assembly Bill 64 (1958), sponsored by William E. Ozzard and Leonard D. Ronco. Although the legislative history recorded in New Jersey is sparse, a more comprehensive statement of legislative intent is found in the comments on the proposed legislation made by the Council of State Governments, in 1956 and circulated to all the adopting States. The Supreme Court in both *Cuyler v. Adams,* 449 U.S. 433, 447 (1981) and *United States v. Mauro,* 436 U.S. 340, 359 (1978), examined the recommendations of the Council of State Governments in interpreting the Interstate Agreement on Detainers, and I find it instructive to do so in this case.

In recommending the adoption of the Interstate Agreement on Detainers, the Council of State Governments outlined some of the problems caused by detainers that the Agreement was designed to address. The Council states that a "prison administrator is thwarted in his efforts towards rehabilitation [since an] inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program." Council of State Governments, Suggested State Legislation for 1957 at 74 (1956). In addition, the Council noted that a prisoner was often deprived of the ability to take advantage of many of the prison's programs aimed at rehabilitation merely because a detainer was lodged against him. *Supra, at* 76. Furthermore, the Council stated that a detainer's existence presented problems in

sentencing. A judge may be reluctant to give a long sentence if a detainer may cause a defendant to lose the privilege of parole or may result in a defendant serving subsequent sentences. *Supra,* at 74.

Significantly, the Council further indicated the type of detainer to which the Agreement was meant to apply. The Council stated:

> Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or *a parolee commits a new crime and is imprisoned in another state.*

Supra, at 74 (emphasis added).

Thus, the Council's explanatory comments address the petitioner's very situation.

Examining the language of the Agreement, its broad purposes, and its legislative history, I find that a probation violation charge is an "untried indictment, information, or complaint" within Article III of the Interstate Agreement on Detainers. N.J.S.A. 2A159A-3. Thus, the Agreement does apply to petitioner's detainer.

The only federal case which reaches a contrary holding is *Sable v. Ohio,* 439 F. Supp. 905, 906 (W.D. Okla. 1977). The court in *Sable* asserts in a conclusory fashion that the basis of the detainer at issue was an alleged violation of parole which is not an "untried indictment, information, or complaint." No examination of the Agreement's language, purpose, or legislative history was made, and I find this case unpersuasive.

Although the State cites *United States v. Reed,* 620 F.2d 709 (9th Cir.), *cert. denied,* 449 U.S. 880 (1980), as

standing for the proposition that Article III of the Interstate Agreement on Detainers does not apply to alleged parole violations, the Court in *Reed* analyzed Article IV and not Article III of the Agreement and held that the petitioner who was in custody awaiting a parole revocation hearing was not serving a "term of imprisonment" as required by Article IV of the Agreement. *Id* at 711. The question of whether a detainer based on an alleged probation violation fell within the Agreement was simply not before the court in *Reed.*

It appears that a majority of state cases conclude that Article III of the Agreement does not extend to detainers based on probation or parole violation charges. *People ex rel. Capalongo v. Howard,* 453 N.Y.S.2d 45, 47, 87 Ap.2d 242, 244 (App. Div. 1982); *Maggard v. Wainwright,* 411 So.2d 200, 242 (Fla. 1st D.C.A. 1982), *cert. denied,* 103 *S.Ct.* 309 (1983); *People v. Jackson,* 626 P.2d 723, 723 (Colo. App. Div. III 1981); *State v. Knowles,* 275 S.C. 312, 313; 270 S.E.2d 133, 134 (1980); *Blackwell v. State of Tennessee,* 546 S.W.2d 828, 829 (Tenn. Cr. App. 1976); *Suggs v. Hopper,* 234 Fa. 242, 243; 215 S.W.2d 247, 248 (1975); *Buchanan v. Michigan Dept. of Corr.,* 50 Mich. App. 1, 2; 212 N.W.2d 745, 746 (1973); *contra, Gaddy v. Turner,* 376 So.2d 1225, 1228 (Fla. 2nd D.C.A. 1979).

None of the above cases, with the exception of *Gaddy v. Turner, supra,* examined the Agreement's legislative history. The only state case that did analyze the legislative intent behind the Interstate Agreement on Detainers reviewed the Council of State Government's comments and concluded, as I have, that detainers based on proba-

tion violation fall within the mandate of the Agreement. *Gaddy v. Turner, supra,* at 1228.

The next question is whether the State of New Jersey violated petitioner's rights under the Agreement.

The New Jersey Interstate Agreement on Detainers, N.J.S.A. 2A:159A-1, *et seq.,* gives a prisoner serving a sentence in one state and against whom a detainer is lodged by another state the right to request final disposition of the matter on account of which the detainer is lodged. Article III(a) of the Agreement provides that the prisoner:

> shall be brought to trial within 180 days after he shall cause to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint.

N.J.S.A. 2A:159A-3(a).

Under Article III(b), a prisoner's written notice and request for final disposition referred to in paragraph (a)

> shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

N.J.S.A. 2A:159A-3(b).

Sanctions under the Agreement are provided for in Article V(c) which states:

> in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III . . . the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

N.J.S.A. 2A:159A-5(c).

It must be determined whether the communications between petitioner and New Jersey authorities compiled with these statutory provisions and, if so, as of what date the 180 day period began to run.

The facts are not disputed by the parties and are as follows:

On June 21, 1976, petitioner pleaded guilty to two counts of a New Jersey indictment. Count One charged the petitioner with breaking and entering with intent to rape, and Count Two charged him with assault with intent to rape.

On October 29, 1976, the New Jersey court sentenced petitioned to eighteen months at the Mercer County Correction Center on each Count, the sentences to run consecutively. The court suspended twenty-four months of the sentence, and petitioner served a twelve-month term. Upon release from the Correction Center, petitioner was placed on probation. While on probation, he was charged, in Pennsylvania, with burglary, involuntary deviant sexual intercourse, and loitering.

Petitioner was arrested and imprisoned pending his trial. On June 21, 1978, New Jersey filed a detainer against petitioner, charging him with violation of proba-

tion. Petitioner was tried and convicted on the Pennsylvania charges on March 14, 1979, and sentenced on July 13, 1979.

On April 13, 1979, petitioner sent his first letter to the Mercer County Prosecutor's Office requesting that the office advise him "what [he] should do in reference to the Probation Violation Detainer." Mr. Nash's letter also stated that "[w]hatever [the Prosecutor's Office] can do with respect to the Probation Detainer, would be greatly appreciated." Although petitioner made no explicit reference to the Interstate Agreement on Detainers, this letter did provide the Prosecutor's Office with notice that petitioner had an outstanding New Jersey detainer that he wanted resolved. However, at the time of the April 13, 1979 letter, Mr. Nash had not received a sentence for his Pennsylvania convictions and, therefore, was not serving a term of imprisonment, which is an essential prerequisite to trigger the 180 day time limit of the Agreement. N.J.S.A. 2A:159A-3(a).

On May 16, 1979, the Mercer County Prosecutor's Office responded to petitioner's letter. It did not bring the Interstate Agreement on Detainer's to petitioner's attention. Nor did the Office inform petitioner that his request for a hearing on the detainer had to be made either to the warden or to the prosecutor and the court. The Mercer County Prosecutor's May 16th letter incorrectly informed petitioner that he would have to contact his probation officer for any resolution of his detainer. Relying upon this advice, petitioner wrote to the Mercer County Probation Office on May 17, 1979 and requested its assistance in obtaining action on the detainer charges.

By reply letter dated May 23, 1979, Probation Officer Robert Hughes informed petitioner that he spoke to Judge Jerome Moore of the Superior Court of New Jersey who stated that no action could be taken on the detainer until after the petitioner was sentenced on July 5, 1979. This letter demonstrated that by May 23, 1979, the Superior Court of New Jersey had notice of petitioner's outstanding detainer.

Unfortunately, Judge Moore provided the Probation Office with erroneous information. Although the 180 day period cannot be triggered earlier than a defendant's sentencing date, a defendant can certainly provide notice to the appropriate authorities before that time. *United States v. Hutchins*, 489 F. Supp. 710, 715 (N.D. Ind. 1980). The defendant's demand for speedy disposition of the charges would be effective as of his sentencing. *Id.* at 715. However, Judge Moore informed Probation Officer Hughes that nothing can be done until after petitioner's sentencing, and Mr. Hughes passed on this information to petitioner, suggesting that he communicate with the Mercer County Probation Office after his sentencing date.

Petitioner followed this incorrect advice and wrote the Mercer County Probation Office on July 20, 1979, one week after his sentencing, to renew his request that action be taken on the detainer as soon as possible. Probation Officer Judith Giordano's reply, dated August 3, 1979, advised petitioner that she communicated with the Public Defender's Office to arrange representation for Mr. Nash and that a hearing would be held concerning the probation violation charge as soon as an attorney was appointed.

Petitioner testified before Judge Barlow in the New Jersey Superior Court that he first received a detainer

procedure notice from the Pennsylvania Correctional Institution on or about August 17, 1979.* This notice stated that the Records Officer would provide the necessary forms to a prisoner if he wished to have his untried indictments resolved and that forms would be forwarded to the District Attorney and the court of the county having jurisdiction. (Transcript II, August 25, 1981, at 12).

Petitioner explained in his testimony before Judge Barlow that he did not seek to complete the prison forms since he already received an answer from his probation officer that he would receive a hearing as soon as a public defender was assigned to him. (Transcript II, August 25, 1981, at 13). In Mr. Nash's words, he "felt that that was a promise and there was . . . nothing else for [him] to do because a hearing would be held very shortly after that." On the basis of his correspondence with the Prosecutor's Office, the Superior Court of New Jersey, and the Probation Office, petitioner justifiably believed that he made an effective demand for final disposition of his pending charges and in fact the proper authorities in New Jersey had been informed of his demand.

When no hearing was scheduled, petitioner wrote two letters on November 5, 1979 once again requesting disposition of his New Jersey detainer. In his letter to Chief Probation Officer Holloway, petitioner explicitly requested final disposition of the probation violation charge on the basis of the Interstate Agreement on Detainers Act and stated that the Pennsylvania Bureau of Correc-

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*The New Jersey Superior Court found that the detainer notice was supplied to petitioner in July 1979 when he first arrived at the Pennsylvania State Correctional Institution at Graterford. (Transcript II, August 25, 1981, at 67).

tions had been asked to attach a certificate indicating the conditions of his sentence. A copy of this letter was mailed to Judge Schoch, the Assignment Judge of the Superior Court of New Jersey, Mercer County. A separate letter was also sent to Judge Schoch which expressed petitioner's frustration in attempting to dispose of his detainer and requested assistance from the Judge on this matter.

Judge Schoch transmitted petitioner's November 5, 1979 letter to the Mercer County Prosecutor with an attached note dated November 13, 1979 suggesting that petitioner was invoking the terms of the Interstate Agreement on Detainers.

On December 6, 1979, petitioner executed Form II under the Interstate Agreement on Detainers formally requesting transfer to Mercer County to resolve the probation violation charge.

This form was addressed to the Prosecutor of Mercer County and constituted a formal notice of petitioner's place of imprisonment and request for disposition of indictments, informations, or complaints. On the same day, Pennsylvania authorities executed Form IV used under the Agreement on Detainers. This form likewise was addressed to the Prosecutor of Mercer County. It constituted an offer to deliver temporary custody of the petitioner to the Prosecutor and set forth pertinent information about petitioner's custody status in Pennsylvania.

On December 14, 1979, he Mercer County Prosecutor's Office responded to petitioner's request by sending Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas. The form authorized

two agents of the Mercer County Sheriff's Office to take custody of petitioner on December 20, 1979. The Sheriff's deputies went to the Correctional Institution but were informed that on December 11, 1979, petitioner had been moved temporarily to a penal institution in Graterford, Pennsylvania.

On or about February 26, 1980, petitioner was returned to the Dallas institution, and on February 28, the Mercer County Prosecutor's Office sent a new Form VI to the State Correctional facility at Dallas. The form designated March 10, 1980 as the date when petitioner would be taken into custody by the New Jersey officers.

Petitioner, however, refused to sign additional papers to effectuate his transfer to New Jersey. Instead, petitioner filed a petition for a writ of habeas corpus on March 6, 1980 in the United States District Court for the Middle District of Pennsylvania, seeking dismissal of the detainer. The State Correctional facility officials notified the Mercer County Prosecutor's Office of this development and, consequently, no agents were sent to bring petitioner to Mercer County.

On November 18, 1980, petitioner filed a petition for habeas corpus in the New Jersey Superior Court, seeking dismissal of the detainer and asked the District Court in Pennsylvania to stay proceedings in the federal habeas corpus action until the New Jersey court had acted.

On December 9, 1980, petitioner filed an amended petition for habeas corpus with the District Court in Pennsylvania stating that his New Jersey state court petition for a writ of habeas corpus petition had been denied.

On February 3, 1981, the District Court for the Middle District of Pennsylvania transferred the case to this district pursuant to 28 U.S.C. § 1406. After consideration by United States Magistrate Devine and then by me, I ruled in an unpublished opinion that petitioner had not exhausted his state remedies and I stayed the action, as mentioned above, until completion of proceedings in the state courts. Only the most indefatigable litigant would have pursued his remedy with the persistence demonstrated by petitioner.

Petitioner argues that the notice provisions of Article III(a) were satisfied by his April 13, 1979 letter to the Mercer County Prosecutor taken in conjunction with the Mercer County Probation Office's May 23, 1979 reply letter which demonstrated that a New Jersey Superior Court Judge had been notified of petitioner's outstanding detainer and request for hearing. Petitioner submits that the 180 day statutory period commenced on July 13, 1979, the date of his sentencing, since he was then serving a term of imprisonment as required by Article III of the Agreement. Petitioner requests that he be relieved from the effect of his detainer and of the conviction on the underlying probation violation charge since the State failed to schedule a hearing by January 9, 1980, 180 days after his sentencing date.

The State argues that the 180 day period commenced December 6, 1979 when the petitioner executed Form II under the Interstate Agreement on Detainers formally requesting transfer to Mercer County to resolve the probation violation charge. The State submits that the 180 day period was tolled 91 days later, since petitioner refused to sign transfer papers and filed a habeas corpus

petition seeking dismissal of his detainer on that date. Therefore, the State maintains that no violation of petitioner's rights under the Agreement occurred.

Ordinarily, a prisoner must comply with all the formal prerequisites of Article III to trigger the Agreement's 180 day period. The process is begun when the official having custody of a prisoner "promptly informs" the prisoner of any detainers lodged against him and of his right to request final disposition of the outstanding charges. N.J.S.A. 2A:159A-3(c). A prisoner must then notify his custodian that he wishes final disposition of the charge, and the custodian must notify all appropriate prosecuting officers and courts in the jurisdiction in which the prisoner is initiating proceedings of the prisoner's request for final disposition. N.J.S.A. 2A:159-3(d). The statute further provides that any notification will be accompanied with a certificate from the petitioner's custodian stating the prisoner's term of commitment, time already served on the sentence, amount of good time earned, and parole eligibility. N.J.S.A. 2A:159A-3(a). With the receipt of this formal request, the charging state is put on notice that it has 180 days to bring the defendant to trial on the untried indictment, information, or complaint. N.J.S.A. 2A: 159A-3(a).

However, in the unusual circumstances of this case, petitioner was misled and given inaccurate information regarding the action he should take with respect to his outstanding detainer by the Mercer County Prosecutor's Office, the Superior Court of New Jersey in Mercer County, and the Mercer County Probation Office, which was acting upon instructions of the court. Petitioner relied on their advice and followed their instructions carefully. The

Pennsylvania prison authorities did not notify the petitioner of his rights under the Interstate Agreement on Detainer until July or August 1979, after the petitioner had already corresponded with the Mercer County Prosecutor's Office and the Mercer County Probation Office and followed, to his detriment, the advice they gave.

The defendant State of New Jersey cites several cases for the proposition that the 180 day period commences only upon a prisoner's technical compliance with the Agreement's requirements. *State v. Ternaku,* 156 N.J. Super. 30, 34 (App. Div.), *cert. denied,* 77 N.J. 479 (1978); *Gray v. Benson,* 443 F. Supp. 1284 (D. Kan. 1978); *People v. Primer,* 59 App. Div.2d 221; 399 N.Y.S.2d 478 (App. Div.), *aff'd,* 46 N.Y.2d 1048; 416 N.Y.S.2d 548; 389 N.E. 2d 1070 (1977); *People v. Daily,* 46 Ill. App.3d 194; 360 N.E.2d 1131 (Ill. App. 1972).

However, none of these cases involved a prisoner who received inaccurate or misleading information from duly constituted state authorities regarding the disposition of outstanding detainers. In fact, in *People v. Daily, supra,* the court stated, in dictum, that courts require only a good faith, diligent effort by the prisoner to invoke the Interstate Agreement on Detainers when his action is the result of mistake or misguidance by the officials involved. *Id.* 360 N.E.2d at 1137. Likewise, the court in *Pittman v. State,* 301 A.2d 509 (Del. Sup. Ct. 1973), noted that the "burden of compliance with the procedural requirements of [the Agreement] rests upon the party states and their agents; the prisoner, who is to benefit by this statute, is not to be held accountable for official administrative errors which deprive him of that benefit." *Id.* at 514.

Federal courts have also adopted the philosophy that technical compliance is unnecessary if, through no fault of his own, a petitioner fails to meet all the Article III requirements.

In *United States v. Hutchins,* 489 F. Supp. 710 (N.D. Ind. 1980), the petitioner, after being advised by a United States Marshal of his rights under the Interstate Agreement on Detainers, made a request for final disposition of his detainer to the Marshal rather than to his custodian as required by Article III(b). The Marshal erroneously notified only the United States Attorney's Office and not the United States District Court of petitioner's request. In addition, the petitioner made the request for disposition before he was serving a term of imprisonment as required by the Agreement. The court found that the petitioner nevertheless fulfilled his obligations under the Interstate Agreement on Detainers stating that "it would be asking entirely too much to require a prisoner incorrectly notified of his rights by the wrong person at the wrong time, yet seeking to assert his right in the manner expressly provided by that person to know that his actions do not fit the letter of the statute under which he asserts his rights." *Id.* at 716. The court stated that where a prisoner is "led to believe that he has made an effective demand for final disposition of pending charges," the fact that the request was made prior to sentencing does not negate the effect of the notice, but only means that the 80 day period commences once the prisoner is sentenced. *Id.* at 715. To hold otherwise, the court asserted, would undercut the purposes of the Agreement and the mandate that a court liberally construe the Agreement so as to effectuate its purposes. *Id.* at 714.

In *Schofs v. Warden,* 509 F. Supp. 78 (E.D. Ky. 1981), the court held that since the petitioner failed to receive the appropriate forms, through no fault of his own, his letters sent directly to the clerk and the state attorney's office satisfied the Interstate Agreement on Detainers even though the literal terms of the Act were not met. *Id.* at 82.

Finally, in *Beebe v. Vaughn,* 430 F. Supp. 1220 (D. Del. 1977), the court held that strict compliance was necessary under the Agreement, noting that they were not examining a case in which a petitioner alleges that the state authorities were responsible for a "procedural default" under the Agreement. *Id.* at 1224.

In the instant case, petitioner should not be penalized for following the instructions he received from the Mercer County Prosecutor's Office, the New Jersey Superior Court and the Mercer County Probation Office.

The facts of this case must be viewed in light of the Agreement's purpose of expeditiously disposing of outstanding detainers and determining an inmate's proper status under all detainers. N.J.S.A. 2A:159A-1. I further note that the Agreement must be construed liberally to effectuate its purpose, N.J.S.A. 2A:159A-9, and that the Supreme Court has found that a primary purpose of the Agreement is to protect prisoners against whom detainers are outstanding. *Cuyler v. Adams,* 449 U.S. 433, 449 (1981).

I hold that petitioner gave notice to the Mercer County Prosecutor's Office on April 13, 1979 when he expressed his desire to resolve his outstanding detainer even though the petitioner did not mention the Interstate

Agreement on Detainers by name. Petitioner gave notice to the Superior Court of New Jersey by at least May 23, 1979 when it became clear in Probation Officer Hughes' reply letter that Judge Moore of the Superior Court was informed of petitioner's outstanding detainer. However, the 180 day period was not triggered until July 13, 1979, the date of petitioner's sentencing because the petitioner was not serving a term of imprisonment until that date.

Since the State did not fulfill its obligation to hear the underlying charges of petitioner's detainer by January 9, 1980, 180 days after petitioner notified the proper authorities, I find that the State violated petitioner's rights under the Interstate Agreement on Detainers. N.J.S.A. 2A·159A-1, *et seq.* His conviction for violation of probation is a nullity and a writ will issue freeing him from the effect of such conviction.

Petitioner's attorneys are requested to submit an appropriate form of order or writ.

/s/ Dickinson R. Debevoise
U.S.D.J.

DATED: March 7, 1983.

UNITED STATES DISTRICT COURT
DISTRICT COURT OF NEW JERSEY

CIVIL ACTION NO. 81-401

RICHARD NASH

vs.

PHILIP S. CARCHMAN
Prosecutor of Mercer County
State of New Jersey

Respondent

ORDER

(Filed March 21, 1983)

The verified petition of petitioner Richard Nash for a writ of habeas corpus having been presented to the Court; and the Court having held a hearing thereon on January 4, 1983; and the Court having considered the argument of counsel, the legal briefs and the exhibits, it is:

ORDERED that for the reasons stated in the Court's opinion dated March 7, 1983, the petitioner's conviction of a violation of probation in the Superior Court of New Jersey is a nullity, and it is further

ORDERED that the petitioner will be free from the effect of such conviction.

/s/ Dickinson R. Debevoise
United States District Judge

Dated March 21, 1983

C-161 SEPTEMBER TERM 1982

20,352

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

RICHARD NASH

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

(Filed November 12, 1982)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-778-81T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 10th day of November, 1982.

/s/ Stephen W. Townsend
Clerk

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-778-81T4

(Filed June 22, 1982)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD NASH,

Defendant-Appellant.

Submitted on May 25, 1982—Decided June 22, 1982.
Before Judges Ard and Trautwein.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County.

Stanley C. Van Ness, Public Defender, attorney for appellant (Ellen Shiever, Assistant Deputy Public Defender, of counsel and on the letter brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for respondent (Ronald Susswein, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant appeals the denial of his motion to dismiss a detainer and the charges of violation of probation underlying that detainer on the grounds that the State failed to dispose of the charges within the 180 day period required by the New Jersey Interstate Agreement on Detainers. *N.J.S.A.* 2A:159A-1 *et seq.* (Agreement on detainers and in particular Art. III of that act.) Defendant additionally alleges as error the failure of the sentencing court to credit him with remitted "good time" when sentenced after a determination that he violated the conditions of his probation.

On June 21, 1976 defendant entered pleas of guilty to charges of breaking and entering with intent to rape contrary to *N.J.S.A.* 2A:94-1 and assault with intent to commit rape contrary to *N.J.S.A.* 2A:90-2. He was sentenced to consecutive 18 month terms at the Mercer County Correction Center on October 29, 1976. The court suspended 24 months of the sentence and accordingly defendant was to serve a 12 month term with 24 months probation to begin upon release. In actuality the defendant spent but 249 days in jail. The remaining 116 days were remitted as "good time."

On June 13, 1978, while on probation, defendant was arrested in Montgomery County, Pennsylvania, and charged with burglary, involuntary deviate sexual intercourse and loitering. Thereafter on June 21, 1978 the Mercer County Probation Department filed a detainer

against defendant charging him with violation of probation. Defendant was convicted of the charges in Pennsylvania on March 14, 1979. On July 13, 1979 he was sentenced to a minimum of five and a maximum of ten years at the State Correctional Institution at Dallas, Pennsylvania.

Defendant sent a letter on April 13, 1979 to the Mercer County Prosecutor contesting the validity of the Pennsylvania convictions. Expressing confidence that his most recent convictions would be overturned on appeal, he requested the Mercer County Prosecutor to dismiss the New Jersey detainer. The prosecutor replied by letter on May 16, 1979, advising that defendant's request was premature inasmuch as the defendant had not been sentenced. Thereafter on July 19, 1979 defendant was sentenced to a minimum term of five years and a maximum term of ten years. It is uncontradicted that on July 18, 1979 defendant received an initial sentence status report formally advising him of the outstanding New Jersey detainer. This report also outlined the procedures by which defendant could insure prompt disposition of the probation violation detainer. Instead of preparing the necessary document defendant on July 20, 1979, wrote another letter to his probation officer in New Jersey complaining about his convictions and his confidence in the eventual overturning of the same. The probation officer wrote on August 3, 1979 in response to this letter advising defendant that the public defender's office would send him an application. Defendant made no further efforts to resolve his parole probation violation problem during the next three months.

Eventually, on November 5, 1979, defendant sent letters to the Mercer County Chief Probation officer and the Assignment Judge requesting a final disposition of the outstanding complaint pursuant to Art. III of the interstate agreement on detainers. The assignment judge transmitted defendant's letter to the Mercer County Prosecutor with a note suggesting that the defendant was invoking the terms of the agreement on detainers.

Finally on December 6, 1979 defendant signed a document formally requesting an interstate agreement detainer transfer to Mercer County to resolve the probation violation charge. All of the necessary supporting documents were contained with that request. Thereafter the Mercer County Prosecutor's Office moved to transfer the defendant to New Jersey. On December 14, 1979 defendant was formally advised that the transfer would occur on December 20, 1979. On December 20, 1979 two Mercer County sheriffs proceeded to the State Correctional Institution in Dallas, Pennsylvania, to bring defendant back to New Jersey. Upon arrival they were informed defendant had been temporarily transferred to another prison regarding further matters to be disposed of by the Pennsylvania courts.

Defendant returned to Dallas, Pennsylvania, on February 26, 1980. Two days later defendant was informed that he would be transferred to New Jersey on March 10, 1980. Defendant, however, obstructed this scheduled transfer of custody by filing a petition of habeas corpus in the Federal courts on March 6, 1980. Amendatory petitions were eventually filed involving both the New Jersey and Pennsylvania Federal District Courts and the Superior Court in Mercer County. These actions culminated on

June 23, 1981 with the Federal District Court of New Jersey terminating defendant's action without prejudice to allow him to pursue his claim in the New Jersey courts under the agreement on detainers.

Ultimately defendant was brought back to New Jersey. On August 25, 1981 the trial court denied defendant's motion to dismiss the detainer and found him guilty of having violated his probation on the basis of the Pennsylvania convictions. Defendant was resentenced to serve two consecutive 18 month terms with credit for 249 days defendant had served in 1976 and 1977.

Critical to the trial judge's determination to deny defendant's motion was a finding that defendant's correspondence from April to November 1979 failed to satisfy the notice requirements necessary to commence the running of the 180 day disposition of charges set forth in *N.J.S.A.* 2A:159A-3(a).[1] The trial judge concluded that

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[1] (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole elegibility of the prisoner, and any decisions of the State parole agency relating to the prisoner.

defendant did not comply with the notice requirements of *N.J.S.A.* 2A:159A-3 before December 6, 1979, which was the earliest possible date on which the Mercer County Prosecutor could have received a certificate from Pennsylvania authorities stating the terms of the defendant's commitment, which terms are an essential condition precedent to triggering the 180 days provision of the statute. This conclusion coupled with the time delay occasioned by defendant's petitions to the Federal court clearly demonstrates the correctness of the trial court's decision to deny the motion.

We note the State's argument first raised on this appeal that the agreement on detainers does not apply to probation revocation proceedings. In light of that which we have just concluded we find it unnecessary to address this question.[2]

As was first stated, in this option, defendant spent 249 days in jail under his original sentence of one year imprisonment and 24 months probation. The remaining 116 days of the prison term were remitted as "good time." In resentencing, the trial judge expressly credited only actual time served rather than the full one year term. Defendant now urges this was error and that he should be credited with a full year on his resentence. We disagree.

The provision under which defendant was awarded "good time" credit and which was applicable to defendant at resentencing reads as follows:

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[2] We observe, however, that a probation revocation proceeding is not part of the criminal process but part of the corrections process and hence is not a crime for which defendant has not been prosecuted. *Morrissey v. Brewer*, 408 *U.S.* 471 (1972); *State v. Generoso*, 156 *N.J. Super.* 540, 544 (App. Div. 1978); *State v. Johnson*, — *N.J. Super.* — (App. Div. 1982).

2A:164-24 Remission of sentence of prisoners confined in county jail or penitentiary for good conduct.

The board of chosen freeholders of any county, or the committee on the discharge of prisoners of such board, may, upon the recommendation of the sheriff or jail warden of the county jail or penitentiary in whose custody any prisoner may be, remit for good conduct from the sentence of any person committed to such county jail or penitentiary, a term not exceeding 1 day for every 6 days of such sentence. If any such person shall be again convicted and sentenced to imprisonment in such county jail or penitentiary, he may, in addition to such new sentence, be required at the discretion of the court to serve out the number of days remitted to him on the previous term.

It is self-evident that the sentencing Judge has discretion to order defendant to serve out the number of days remitted to him on the previous sentence. We conclude this discretion was not abused.

Accordingly, the judgment under appeal is affirmed in all respects.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin
Clerk

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

No. 495-74

Oral Opinion Delivered August 25, 1980

STATE OF NEW JERSEY

vs.

RICHARD NASH,

Defendant.

* * *

(p. 37)

THE COURT: This is a motion brought by the defendant, Richard Nash, under Indictment 459-74 for a dismissal of a detainer lodged against him by the Mercer County Probation Department alleging violation of his conditions of probation under Indictment 459-74, and filed with the Pennsylvania authorities where he was incarcerated at the time of filing the detainer, being under arrest on (p. 38) charges in Pennsylvania at that time. The defendant contends that the provisions of NJSA 2A:159A-5c should be invoked under the Interstate Agreement on Detainers, that is, that he had satisfied the provisions of that Interstate Agreement and requested that a hearing be held on the validity of the detainer lodged against him, and that that hearing was not held within the prescribed one hundred and eighty day period and, therefore, the provisions of Section C require that the Court dismiss with prejudice the detainer filed in this matter. The State opposes such a dismissal, and contends that the defendant did not comply with the provisons of the Interstate Agreement on Detainers until December 6th, 1979. The defendant contends that various correspondence he directed to the Prosecutor, Probation Office, and the Courts prior to

July 20th letter, that's July 20th, 1979, a letter he wrote, he forwarded to his then Probation Officer, Miss Giordano, fully complied with the provisions of that Act. The Act in question entitled Agreement on Detainers, 2A: 159A, Article three, which is the section under which this particular matter has been spawned, that section permits a prisoner who is serving a term (p. 39) in another State to move under a certain procedures and conditions to have any detainers against him in any other State expeditiously heard and disposed of. And Article three reads as follows: "(A), whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information or complaint, on the basis of which a detainer has been lodged against a prisoner, he shall be brought to trial within a hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate Court of the prosecuting officer's jurisdiction, written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint. . . . ."—strike that, continuing on: "After complaint, provided that for good cause shown in open Court the prisoner or his counsel being present, the Court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate (p. 40) official having custory of the prisoner, stating the term of commitment under which the prisoner's being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of the parole eligibility of the prisoner, and any decisions of

the State Parole Agency relating to the prisoner. Subsection B of Article three reads as follows: "(b), the written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, Commissioner of Corrections, or other officials having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and Court by registered or certified mail, return receipt requested. (c), the warden, Commissioner of Corrections, or other officials having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him, and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based. . . . . The same Interstate Agreement also provides under 2A:159A-9 as follows, (p. 41) that's Article ten, quote, "This Agreement shall be liberally construed to as to effectuate its purposes. . . ." That same section then goes on to set forth the standard stating clause where any one section might be determined subsequently by a Court to be unconstitutional or, or infirm in any way that the other sections are saved and preserved. The first article of this Agreement reads as follows: Article one, "The party States find that charges outstanding against a prisoner, detainers based on untried indictments, information or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this Agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried

indictments, informations or complaints. The party States also find that proceedings with reference to such charges and detainers when emanating from another jurisdiction cannot properly be had in the absence of cooperative procedures. (p. 42) It is the further purpose of this Agreement to provide such cooperative procedures." Therein is stated at the outset of the Agreement the purpose of this Agreement and as pointed out by the Court, this application is based upon Article three where the request for a disposition emanates from the prisoner, inmate, himself, and not from Article four, where the request for temporary custody of the inmate emanates from the appropriate Prcsecutor or officer in the State seeking to expedite the trial of a matter pending in that jurisdiction.

Now, a review of the chronological factors upon which this decision is based is necessary, and I believe the vast majority of these factors are undisputed. The history of this matter goes back to June 21, 1976, when the defendant, Richard Nash retracted his plea of not guilty to two counts under Indictment 495-75, a Mercer County Indictment, and pled guilty to both of those counts. Count one charged the defendant with breaking and entry with intent to rape, and count two charged the defendant with assault with intent to rape. The defendant was sentenced by this Court on October 29th, 1976 under each count to eighteen (p. 43) months the Mercer County Corrections Center, and those sentences were to run consecutive to each other for a total of thirty-six months. The Court, thereupon, suspended the execution of the service of twenty-four months of the thirty-six months sentences imposed, and at the expiration of the defendant's service of the twelve months

required by the Court sentence, the defendant was then placed on a period of probation for two years. After serving the required custodial portion of his sentence and after he was released, and while on probation, as it was imposed by this Court, defendant, on June 13th, 1978, was arrested and then subsequently convicted in the Commonwealth of Pennsylvania for the crime of burglary and involuntary deviant sexual intercourse. The Probation Department of Mercer County, when it learned of the defendant's arrest in Pennsylvania filed a probation violation complaint against the defendant in Mercer County under Indictment 495-74 and a detainer was lodged against the defendant on June 21, 1978 with Pennsylvania authorities. Defendant, Nash was sentenced under his Pennsylvania convictions on July 13, 1979 to a minimum five and ten years in jail on those convictions. (p. 44) On April the 13th, the defendant addressed a letter to the then Mercer County Prosecutor, Mrs. Anne Thompson, that letter is part of the State's appendix in support of its letter memorandum. The defendant contends in the present matter that that letter was a request under the Interstate Compact by the defendant o the Mercer Couny Prosecutor for a hearing on his detainer and a disposition of the same under the Interstate Agreement on Detainers Act. In addition, there were subsequent pieces of correspondence, which the Court will refer to, which the defendant also claims complied with the provisions of the aforesaid Act. Those pieces of correspondence are part of the appendix attached to the defendant's memorandum of law in support of its motion in this matter. The first one, chronologically, is a letter appearing at D-3 of the defendant's appendix, which was in response to the defendant's letter to the Mercer County Prosecutor, Mrs. Thompson,

dated April 13th, 1979, and it was a short response from Assistant Prosecutor John S. Furlong to that letter, and indicating that the Prosecutor's office had no jurisdiction over his case at that point, and advising him, the defendant (p. 45) that he should contact the, his Probation Officer here in Mercer County for any resolution of the violation of his probation that was pending. The next letter is from Robert Hughes, DA-4, to Mr. Nash in response to a letter addressed to Mr. Nash's Probation Officer in Mercer County, Judy Giordano of May 17, indicating that she was away on vacation and that he had discussed the contents of that letter with Judge A. Jerome Moore concerning the detainer lodged against him for violation of probation, and that Judge Moore had said the Probation Department could take no action concerning that detainer till after he was sentenced in Montgomery County, and suggested he then write Mrs. Giordano. Exhibit DA-5 in defendant's appendix is a letter of July 20, 1979 to Mrs. or to Miss Giordano in which the defendant makes reference to his attempt to get out on appeal of his Pennsylvania matter on bail, and then that he would like to get this detainer taken care of as soon as possible. Then it also relies on a reply to that letter of Miss Giordano, DA-6 dated August 3rd, 1979, to him wherein she discusses his pending violation of probation and that she requests the Public Defender's office to send (p. 46) him an application for their services, and states that as soon as he is assigned a Public Defender in New Jersey, there will be a hearing in the Court of Honorable Richard J.S. Barlow, Jr.

The next factual event in this matter occurs when the defendant addressed a letter, two letters on November the

5th, 1979; one to the Honorable George Y. Schoch, then Assignment Judge of Mercer County, and the other to Harold Holloway, Chief Probation Officer of Mercer County. In his letter to Judge Schoch, the last paragraph he states, quote, "On the basis of the Interstate Agreement on Detainers Act, I respectfully request that a final disposition be made of the complaint now pending against me, pursuant to Article three of this Act, I have asked the Pennsylvania Bureau of Corrections to send with this letter a certificate indicating the conditions of the sentence which I am now serving." Judge Schoch then wrote a short memo to the Prosecutor, including a copy of Mr. Nash's letter of November 5th, 1979, and indicated to the Prosecutor that Mr. Nash appeared to be invoking the terms of the Interstate Agreement on Detainers Act. The Mercer County Prosecutor's office, thereupon, on or about December the (p. 47) 6th, 1979, no, earlier than that date, but at least on that date or shortly, a few days thereafter, received from the Pennsylvania Bureau of Corrections defendant Nash's formal request pursuant to the provisions of the Interstate Agreement on Detainers, and that would be form two, requesting that a hearing be held on the detainer filed against him pursuant to the provisions of the Act. The Mercer County Prosecutor's office immediately responded to this request by a document on December 14th, 1979, form six of the Interstate Agreement on Detainers being sent to the defendant by Detective John Marut of the Mercer County Prosecutor's office, which authorized two agents of the Mercer County Sheriff's Office to transport the defendant to Mercer County on December 20th, 1979 from the Pennsylvania State Correctional Institution at Dallas, where he was incarcerated for

the purposes of a hearing on his detainer as requested by the defendant through the filing of his form two under the Interstate Agreement. Detective Marut has filed an affidavit which is part of the defendant's appendix, DA-11, wherein he states that pursuant to the form six notice sent to the defendant, he and another officer arrived at the Dallas (p. 48) institution on December 20th, and were informed by the institution that Mr. Nash had been transported or transferred on December the 11th, 1979 to another penal institution, Graterford Institution in Pennsylvania because of matters pending in Montgomery County, and that he would possibly be held there for approximately one month. On or about February 26th, 1980, Detective Marut was informed by Pennsylvania authorities that Mr. Nash had returned to the State Correctional Institution at Dallas, and that he should refile the form for Mr. Nash's transfer. He did so on February 28th, 1980 and set the date of March 10th, 1980 as the date which they would pick up Mr. Nash to transfer him to New Jersey for the hearing in question. Mr. Marut's affidavit states that the Dallas authorities, upon receiving that form six, advised him by telephone that Mr. Nash was appealing and petitioning the Federal Courts for dismissal of the Mercer County detainer and, therefore, no agents from Mercer County were sent to transport Mr. Nash back as scheduled on March 10th, 1980.

It is also undisputed that Mr. Nash had in fact filed on March the 6th, 1980 in the Federal Courts for the Mid-

dle District of Pennsylvania, (p. 49) United States Federal Court, a petition for writ of habeas corpus in this matter, thereby, in effect attempting to remove jurisdiction from New Jersey into the Federal Court. And the Prosecutor of Mercer County participated in those lengthy proceedings. There was anther legal filing by the defendant pursuant to an order in the Federal Court where the Federal Court apparently held that he hadn't exhausted his remedies in New Jersey, and he, therefore, filed a petition for habeas corpus in New Jersey, seeking dismissal of the same detainer which was filed with the then Assignment Judge George Y. Schoch, who in effect denied that petition informally by a letter directed to the defendant of December 3rd, 1980, in which he said, quote, "There is no basis for the issuance of such a writ, as you have not complied with the requirements of NJSA 2A:159-A-1 et seq." Defendant filed an amended petition in his habeas corpus action in Pennsylvania on December the 9th, 1980, in a memorandum opinion on February 3rd, 1981, the Federal Court, for the Middle District of Pennsylvania concluded that the proper vicinage for the disposition of the defendant's habeas corpus proceedings would be the New Jersey Federal Court, (p. 50) and entered an order removing it to that tribunal. The matter was, therefore, in the District Court United States District for New Jersey, subsequently Magistrate John Devine renedered a preliminary review and report and recommendation to the Federal Court Judge handling this particular matter, that is, Judge Dickinson R. Debevoise. Thereafter, Judge Debevoise issued an opinion on June 21st, 1981, directing the Mercer County Prosecutor's office to file certain additional information with that Court, basically informing the

Federal Court whether or not there was available to the defendant in the State Courts a form for hearing the matters raised in his detainer dispute, and when that hearing would be held. Thus, the matter is presently before this Court for adjudication.

Now, as previously indicated, the defendant contends that the various pieces of correspondence referred to in the Court's factual statement prior to the actual formal initiation of the provisions of the Interstate Agreement on Detainers on December 6th, 1979, that they were sufficient under Article three of the Agreement to start the hundred and eighty day period running, and that the Prosecutor failed to respond and bring him into New (p. 51) Jersey and dispose of this matter within a hundred and eighty days from those letters and, therefore, he's entitled to a dismissal.

Concerning the letters in question, a review of the same, they indicate that there was never a request by the defendant for a hearing on his detainer to any responsible authority in Mercer County. I particularly refer to the first letter of April 13th, 1979 from the defendant to Mrs. Anne Thompson, Prosecutor of Mercer County. A reading of that letter clearly demonstrates that the defendant was more concerned with explaining to the Prosecutor the injustices that were heaped upon him by the Pennsylvania judicial system in his then pending matters, and in the center of a lengthy statement concerning those injustices he makes the comment, quote, "I strongly feel that the trial Judge (referring to the Pennsylvania trial Judge before whom he was convicted in Pennsylvania) is going to overturn the burglary conviction sometime in the next forty days. However, the question at hand is a probation

detainer which was served on me on June 24th, 1978." That is his only reference to the detainer served upon him, the detainer from Mercer County with the final, (p. 52) with the exception of the final sentence, quote, "Whatever you can do with respect to the probation detainer would be greatly appreciated." That can hardly be construed as a notice to the Prosecutor, and furthermore, a notice to the Court that the defendant was seeking and invoking the provisions of the Interstate Agreement. Defendant then relies upon the reply letters of an assistant Prosecutor and it should be noted that at this time the defendant had not been sentenced, and it should also be noted that the general provisions of the Act require that the defendant be serving a term of imprisonment when the invocation of the other sections of the Agreement are invoked, and he was not serving a sentence at that time, he hadn't been sentenced until July 16th, I believe was the date, July 16th, 1979—

MR. HUSID: Excuse me, your Honor, the 13th.

THE COURT: July 13th, thank you, 1979, yes, you're right. The replies of the Prosecutor to the effect that they had no jurisdiction obviously went to their interpretation of the Interstate Agreement, if that was what they thought he was referring to, and furthermore, they were correct in that they had no jurisdiction to lift or (p. 53) vacate a detainer by the Probation Department, and they merely told him to discuss it with his Probation Officer, which he then did. The Probation Officer then had correspondence with Mr. Nash, and erroneously indicated to him, that is the letter of Miss Giordano, August 3rd, 1979, that as soon as the Public Defender was assigned to him and he had filled out the forms, a hearing

would be held in the courtroom of the Honorable Richard J.S. Barlow, Jr., it's apparent from that misstatement that Miss Giordano was under the impression legally that Mr. Nash was going to present himself voluntarily here in Mercer County, if he did so a hearing would be set up and his detainer disposed of. But once again, that letter is not to the Prosecutor, it's not from the Prosecutor, and has nothing to do with the authorities who were the proper authorities to whom the defendant was well aware that he should address any such correspondence concerning a hearing on his detainer and the lifting of the same. I would point out that in all the letters written by Mr. Nash, they go into great detail as to the bad treatment, improper treatment, illegal treatment, and unjust conviction by the Pennsylvania authorities, and (p. 54) peripherally, or almost as an afterthought, referred to the detainer and not one of them in any way requests a prompt hearing, or invocation of the provisions of the agreement, Interstate Agreement. The first time, as I said, that that formal request arose was in his letter of November 5th, 1979 to Judge Schoch, and also to Mr. Holloway of the Probation Department. The New Jersey Courts have reviewed in cases for various reasons and on various grounds the Interstate Compact. In *State versus Ternaku,* T-e-r-n-a-k-u, 156 New Jersey Super 30, Appellate Division 1978, Judge Michaels had before him a matter where the defendant had been indicted in New Jersey in 1974 and was not located until 1975 when he was discovered as an inmate in a New York correctional facility. A detainer warrant was filed with the New York authorities, then on January 13th, 1976, the Superintendent of the Clinton Correctional Facility, which is in New York, executed and delivered to defendant a formal notice pursuant to the Interstate

Agreement on Detainers, and informed him of his rights to request the New Jersey authorities to make a final disposition of that indictment. January 22, 1976, the defendant executed and (p. 55) delivered to his custodian at the New York facility a written notice and request for final disposition of the indictment pending against him, it was promptly forwarded to the Warren County Prosecutor, together with the required statutory certification. The facts clearly showed that the County Clerk of that County in fact received that notification on January 28th, 1976. The defendant contested the trial Court's denial of his argument that the hundred and eighty day period in that case should have commenced after he executed and delivered the notice and request to the Superintendent of the New York Institution, which would have been on January 22, 1976, rather than as the trial Court found, that the proper date would be when the notice was in fact received by the authorities in New Jersey, that's January 28, 1976. The Appellate Division unanimously upheld the trial Judge, and in commenting upon the Agreement, Interstate Agreement on Detainers at page 34, made the observations, quote, "The language of the statute is explicit, it provides for the commencement of the hundred and eighty day period when defendant has 'caused to be delivered to the prosecuting officer and the (p. 56) appropriate Court' the written notice and request for final disposition of the pending indictment. The Legislature clearly intended that the documents be delivered to the Prosecutor and the appropriate Court before the hundred and eighty day period starts to run. The period does not start to run upon mere execution and delivery of the notice and request to the warden, Commissioner of Corrections or other officials having custody of the defendant. In our view, it

would be contrary to public interest to start the running of the hundred and eighty day period prior to actual receipt of the notice and request by the Prosecutor and the Court. If we were to interpret the statute as defendant requests, an indictment would be subject to dismissal each time delivery of the documents to the Prosecutor and the Court is delayed, regardless of the case. We cannot conceive our Legislature as intending such a result by enacting the Interstate Agreement on Detainers; as a matter of fact, had the Legislature intended the hundred and eighty day period to begin from the time a defendant delivers the notice and request to the warden, Commissioner of Corrections or other officials having custody over him, it could have (p. 57) so signified by appropriate language. While no reported decisions were found directly on point, our result is inferentially supported by *State versus Mason,* 90 New Jersey Super 464, Appellate Division, 1966, and *State versus Lippolis,* 101 N.J. Super 435 (Law Division 1968) affirmed 107 N.J. Super, 137 (App. Div. 1969) reversed on other grounds 55 N.J. 354 (1970). For example, in State versus Mason, we noted in a footnote that, "the Warden's delay in forwarding the tender does not stop the running of the hundred and eighty day period from the date when the Prosecutor received defendant's request." Now, it should also be noted that it is clear under the provisions of this Interstate Agreement which New Jersey has adopted that the requirements procedurally Article three, requires written notice of the place of the defendant's imprisonment and a request for a final disposition be delivered to the prosecuting officer and the appropriate Court. Section B places the burden of delivering those documents not on the defendant or the inmate, but on the custodian in the institution wherein he or

she is incarcerated, and says, quote "written notice and request for final disposition referred to in (p. 58) paragraph A hereof shall be given or sent by the prisoner to the warden, Commissioner of Corrections or other officer having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and Court by registered or certified mail, return receipt requested." And it is evident that the simple procedure has a purpose because there later on appears what must be in that certification, and there's a lot of information in there that is necessary to be supplied to the requesting State or the Prosecutor or the Court in that State concerning the defendant's status in the custodial State. It also conforms with Section C, which puts the burden upon the institution of promptly informing any inmate of the contents of any detainer lodged against him, and also informing him of his right for request for final disposition, a request, a final disposition of the indictment, information or complaint on which that detainer is based, so the burden is really initially on the custodial authorities, one, to notify all inmates of any detainer against them; two, to notify them of their rights under the Interstate Agreement on Detainers to have an expeditious disposition of (p. 59) those charge; and three, when the inmate indicates he wishes to invoke the provisions of the Act, it is the responsibility of the custodian to see that all the proper papers are promptly forwarded to the Prosecutor and the Court wherein the detainer is emanated. So the mere writing of a letter by an inmate to the Prosecutor certainly in no way conforms with the provisions, the clear expressed provisions of the Act. I would also point out that the clause in the Act dealing with the—

(Pause.)

THE COURT:—direction by the Legislature concerning liberal construction of the provisions of the Act, that is not in this Court's opinion a license for a Court to distort or ignore the plain, clear, unambiguous language of a statute, nor is it license for a Court in legal interpretation to ignore the purposes that are clear and unequivocal as set forth at the beginning of a statute. For a Court, as an illustration, to say that if an inmate calls a prosecutor and says under the Interstate Detainers Agreement I wish immediate disposition of the detainer filed against me by your office or the Probation Office in your State that a Court by a liberal interpretation use of (p. 60) that word in the statute could say that that complies with the statute, I would totally disagree with that being the purpose of a liberal construction, it has more to do with what many cases have found, situations where an inmate has in good faith attempted to invoke the provisions of the statute, but for some reason beyond his control, for instance, either negligence or refusal of a custodial authority to follow out the edicts of the Act in forwarding his request to the State in question, the Courts have held he cannot be denied his right because of something beyond his control. That would be a liberal construction of what the Legislature meant in interpreting the terms, but certainly the terms of this Act are very clear as to where the procedures are to initiate, be initiated, and by whom, and there's good reason for the custodian being the person who gathers the documents together, and sees that they're mailed on and, by registered mail to the authorities in the State where the detainer is, has emanated.

Concerning the content of the letters which defendant relies upon, as support for his invocation of Article

three of the Act, I would also refer to the case of *State versus Chirra,* (p. 61) C-h-i-r-r-a, 79 New Jersey Super 270, Law Division Criminal, New Jersey Superior Court 1963 of Judge Weidenberger. In that case, defendants were indicted in New Jersey for armed robbery, kidnapping and conspiracy to rob. At the time of the return of the indictments, they were both incarcerated in New York for offenses committed in New York and detainers were filed by New Jersey against them in New York on May 8th, 1958. Defendants remained in custody in New York until January, '63, when they returned under the provisions of the Interstate Agreement on Detainers for trial on the indictments in New Jersey, and they moved to dismiss those indictments on the basis that the State failed to comply with the provisions of the Interstate Agreement, and their denial of a right to a speedy trial. Now, following the filing of the detainers by New Jersey with New York authorities on May 8th, 1958, neither the County Prosecutor nor any defendant took any action on those pending indictments under the Interstate Agreement for almost two years. In January of '60, the Prosecutor initiated action to secure their return to New Jersey, and obtained an order for temporary custody in accordance with the Agreement on (p. 62) Detainers. And the defendants were notified by New York authorities of New Jersey's request for their custody for the purpose of trial of those indictments. Both defendants wrote to the Judge in Union County on February 10th, 1960, requesting the indictments against them be dismissed because of the lengthy sentences already being served by them on convictions for crimes in New York. Then the matter was not moved by the New Jersey authorities until April 29th,

1960, when the New York authorities were informed that New Jersey would take custody—strike that—on April of '60 the County Prosecutor in New Jersey informed the New York authorities he would not take custody of the defendants until September, 1960 Court term because of heavy Court calendars for the balance of that Court year, and the imminent summer recess, and no further action was taken until some thirty-one months later by the County Prosecutor, when new procedures were instituted under the statute to obtain the return of the defendants.

Now, the defendants on that proceeding moved to, as I indicated, dismiss the detainers for failure to comply with the provisions of the hundred and eighty day section of the Act, and they (p. 63) relied upon their letter of February 10th, 1960 to the Union County Judge, and said it constituted a request for final disposition of the indictments against them. That letter, as I previously indicated, was a letter to the Court wherein the defendants requested a dismissal of their indictments because they were already serving lengthy sentences on convictions for crimes in New York. In the Court's decision in *Chirra* the Judge made the observation concerning that letter by the defendants at page 276, quote, "An examination of the letters to the Union County Court Judge, however, reveals only individual pleas to have the indictments dismissed in this State because of the lengthy sentences already imposed on those defendants for other offenses in New York. They can hardly be construed as the request, 'for a final disposition to be made of the indictment,' contemplated by NJSA 2A:159A-3."

I would also point out concerning the use of letters as invoking the provisions that inferentially a similar hold-

ing, although it was not the final holding, the case cited by counsel, *Schafs, S-c-h-a-f-s versus Warden, F.C.I. Lexington* 509 F Supp. 78 (1981), there a number of letters (p. 64) were written by the defendant petitioner to the Clerk of the Superior Court in Connecticut, and to State's Attorney General, one in March of 1978 requesting he be tried speedily as possible on any charges then pending. He was then incarcerated in New York. June 9 of '78, again he wrote the Clerk and the State's Attorney General requesting a speedy trial, was sent from the Metropolitan Correctional Center in New York City, and he requested, both letters requested a trial as expeditiously as possible. The final letter of September 20th, 1978, the petitioner sent a more detailed letter to the Clerk and the State's Attorney, this letter referred specifically to the Interstate Agreement on Detainers and the Speedy Trial Act. The Court, in reviewing that matter, and in determining what was the appropriate date for the determination of the invocation of the provisions of the Act by the defendant, said at page 81, quote, "The issue before this Court now can be reduced in part to whether or not the petitioner's letter of September 20th, 1978 satisfied the requirements of the IAD, the Agreement, in terms, requires that the request for final disposition shall be given by the prisoner to the officer having custody of him, (p. 65) but the officer shall forthwith notify the appropriate prosecuting officers and Courts, and that a copy of the prisoner's request and a certificate shall accompany the notification, the certificate shall state the term of the commitment under which the prisoner is being held, the term, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the

time of parole eligibility of the prisoner, and any decision of the State Parole Agency relating to the prisoner. 18 USC April, Section 2 Article 3 (A) (B) (D), the terms of the IAD have not been literally met." However, the Court went on to point out, quote, " The petitioner requested and was denied through no fault of his own, the forms necessary to initiate a request for final disposition pursuant to the IAD, see Magistrate's Report and Recommendation. He then wrote several letters to the Clerk and State's Attorney, requesting a final disposition of the charges against him. In view of the purposes of the IAD and the circumstances here, the petitioner's letter of September 20th, 1978 to the Clerk, State's Attorney, et al, satisfies the requirements of the IAD, the detainer will be quashed." So, it was (p. 66) clear there that the letter writing of the, prior to September 20th, where no mention was made of the IAS and a request for disposition and a hearing the Court ignored as being notice, and would have apparently implicitly ignored the September letter but for the fact of the circumstances that it was established that he had requested the necessary forms and apparently the custodian where he was incarcerated, either refused or ignored that request and thereby in effect was violating the defendant's rights, and the Court held that they would not permit that type of conduct on the part of the custodial officers to block his rights under the Act.

Now, the Court finds on the basis of the provisions of the Act, and also the case authorities cited, that the provisions of the Act must be complied with unless unusual circumstances can be established which would convince the Court that the defendant was prohibited through no

fault of his own from following those simple precise procedures. I would note also that the Prosecutor has submitted an affidavit which is S-1 in evidence which clearly shows that the defendant received either on his reception at Graterford Prison after (p. 67) being sentenced on his convictions in Pennsylvania on July 16th, 1979, or two days later, July 18, 1979, a standard Initial Status Report, a copy of that report showing that there was the detainer against him which he has already acknowledged he knew back in '78, and connected thereto, or attached thereto, a full set of instructions and directions as to his rights concerning that detainer, and how he can invoke those rights under the Detainer Interstate Agreement, the defendant contends that his recollection is he didn't receive a copy of that report until sometime in August, August 18th, August —pardon me—August 13th, that he testified that he guessed it was around August 13th, a few days before he was transferred to Dallas that he received the Initial Sentence Status Report referred to and his copy, and was aware and read the various notices contained there concerning his rights under the Compact.

The Court would find from the documents submitted by Mr. Alters, the affidavit and the attached supporting documents that the standard procedure, as he indicates in his affidavit, was that an inmate would receive that Initial Status Report at the Institution at Graterford when he was received at (p. 68) that institution, and it would be handed over to him no doubt, according to the affidavit, within a day or two of that initial receipt.

Now, counsel would also point out, argue, and cites in support thereof, *United States versus Hutchins*, that would be 489 Fed. Supp. 710, 1980 decision of the United States

District Court for the Northern District of Indiana, that based upon its argument that the letters to the Probation Department and to Prosecutor Thompson, particularly the letter of April, '79, which I have referred to, and discussed, to conform with the notice provisions that the defendant is required to give under the Act and, therefore, it is the argument of the defense that the period under State, under *United States versus Hutchins,* of a hundred eighty day period would be triggered on the date he was sentenced, which was July the 16th, 1979. If the Court were to accept, which it does not, from my previous discussion, that premises that the notice, the notice provisions were complied with substantially by his letter to the Prosecutor and subsequent letters to the Probation Department and that was sufficient under the Agreement, the *United States versus Hutchins* decision would (p. 69) indicate that a prior notification by a defendant before he started service of his sentence as it would be in this case, would not require his refiling that notification after he was sentenced. If that is accepted as a correct legal proposition I would point out to counsel that my calculation would indicate that if you took the date of July 13th, 1979, the date of sentencing and added a hundred and eighty days to it, that period would end January the 9th, 1980. The State, during that same time period at, actually at the instigation of Mr. Nash when he then decided to file the formal papers, his letter of November 5th, 1979 to Judge Schoch, followed by the December 6th, 1979 actual formal papers in compliance, full compliance with the Act, he would have been, had he not on his own thwarted his transfer on December 10th, pursuant to that Interstate Agreement, he would have been here in New Jersey well within the hundred and eighty day period, even starting

from the date of his sentence. And this matter is a probation violation, it is undisputed as far as I can see from the records submitted as to the facts of the probation violation, it's undisputed that he was convicted and sentenced on July 13th, 1979, for (p. 70) the commission of two crimes in Pennsylvania, it is undisputed that those crimes were committed while Mr. Nash was on probation from this Court under a Mercer County sentence, and had he complied with his own request to be brought over here and not blocked the officers transferring him, he would have been here on December the 10th, and the matter would have been disposed of long before the January 9, 1980 date.

MR. WALDRON: Your Honor, may I interrupt?

THE COURT: Yes.

MR. WALDRON: I believe the date was December the 20th, not December the 10th.

THE COURT: On the date they were to pick him up.

MR. WALDRON: The date for transfer was set at December the 20th, sir.

THE COURT: All right. Let me see if I misstated that.

MR. HUSID: I believe that the December 20th date is correct, your Honor, but that's—

THE COURT: Maybe they notified him on the 10th.

MR. HUSID: I think there may be some other confusion, that's not the time which he filed the (p. 71) petition in the Federal District Court in the—

THE COURT: No, I'm not talking about his filing the petition, I'm talking about his filing the proper notice

under the Act which the Prosecutor received no earlier than the 6th and no later than was it the 8th or the 14th?

MR. WALDRON: The response was dated the 14th, sir.

THE COURT: Yes, they don't have it stamped on there—I have to look for Mr. Marut's affidavit.

MR. WALDRON: Your Honor, I believe that is at SA-37.

THE COURT: In your appendix?

MR. WALDRON: Yes, sir.

THE COURT: 37?

MR. WALDRON: Yes, sir.

THE COURT: I was in error. It wasn't the 10th, it was the 20th.

MR. WALDRON: Yes.

THE COURT: Yes, because they had sent the form over and they notified him they'd pick up Mr. Nash on December 20th, then they said upon arrival, as I assume they meant arrival on December the 20th—

(p. 72) MR. WALDRON: Yes, sir.

THE COURT: Because that was the appointed day, that's when they phoned he had been transferred to another institution. But in any event, the point I make is still valid. Assuming all the assumptions made before about the letter notice prior to his sentencing under the Hutchins case, even on that basis, the matter would have been disposed of well within the hundred and eighty day period. The final and the ultimate conclusion of the Court

is as I've indicated, that the defendant did not, through his various correspondence concerning his grievances with the Pennsylvania handling of his criminal matters, his trial and conviction which was the main thrust of his letters to the Prosecutor, and even to the Probation Department, right up until he finally filed the proper form in November, or requested of the authorities in November of 1979, none of those letters can reasonably, realistically be in any way construed as being in compliance with the provisions of the Act. He did comply with the Act in November, and as a result the proper procedures were then triggered and the Prosecutor then moved expeditiously, and the only reason he was not (p. 73) brought over and everything complied with in accordance with the Act was due to his own involvement in being moved, whether it was his fault or the authorities' fault is immaterial, it's not the Prosecutor's fault and the Prosecutor did everything to expeditiously come back again, and then in the interim, through his own initiation, he decided, undisputedly from the record that he was going to attack even the involation on his part of the, of his voluntarily requesting to come to New Jersey under the Agreement. He now has changed his mind at that time, and started a suit in the Federal Court to have the matter dismissed. It was not the fault of the Mercer County authorities, they cannot be tarred by his conduct, and I find that the detainer was valid and viable, and pursuant to the notice that he had, he did make a proper request to be brought into New Jersey for the purpose of a determination of his violation of probation, and there has been no inordinate delay, or no violation of the Compact.

Therefore, your application to dismiss the detainer, Mr. Husid, is denied.

Philip S. Carchman
Mercer County Prosecutor
Mercer County Court House
Broad & Market Streets
Trenton, New Jersey
(609) 989-6309

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL

495-74

STATE OF NEW JERSEY
Plaintiff,

vs.

RICHARD NASH,
Defendant.

O R D E R
DENYING MOTION TO DISMISS
DETAINER

(Filed September 9, 1981)

This matter having come before the Court on August 24 to August 25, 1981 on a Motion to Dismiss Detainer before the Honorable Richard J. S. Barlow, Jr., J.S.C., J. Stewart Husid, Esquire, Assistant Deputy Public Defender, appearing for defendant and James A. Waldron, Jr., Assistant Prosecutor, appearing for the State and the Court having heard and considered the arguments of counsel and the Court having heard and considered the testimony in open Court;

It is on this 8th day of September, 1981, ORDERED that the Motion to Dismiss the Detainer lodged against defendant in June, 1978 by the Superior Court, Law Division of Mercer County for a violation of probation in the above-entitled matter be and hereby is denied.

/s/ Richard J. S. Barlow, Jr., J.S.C.

V I O L A T I O N O F P R O B A T I O N

NEW JERSEY SUPERIOR COURT
MERCER COUNTY

LAW DIVISION - CRIMINAL
S.B.I. No. 0937660
Date of Arrest 11-4-74

THE STATE OF NEW JERSEY
v.
RICHARD NASH,
Defendant

JUDGMENT OF CONVICTION
AND
ORDER FOR COMMITMENT

The defendant on January 3, 1975 was indicted on Indictment 495-74.

The defendant on January 31, 1975 entered a plea of not guilty to the Indictment for the crime(s) of: (Please include Title, Statute and Degree)

Breaking & Entering With Intent to Rape—Viol 2A:94-1, ct. 1

Assault With Intent to Rape—Viol. 2A:90-2, ct. 2

and the defendant having on June 21, 1976

(X) RETRACTED PLEA OF NOT GUILTY AND ENTERED A PLEA OF GUILTY TO:

without finding

( ) BEEN TRIED with A JURY AND A verdict OF
Breaking & Entering With Intent to Rape, ct. 1 and
Assault With Intent to Rape, ct. 2

It is, therefore, on Oct. 9, 1981, ORDERED that the sentence imposed on Oct. 29, 1976 be vacated, and it is further Ordered and Adjudged that the defendant be and is sentenced on Violation of Probation to the Mercer County Correction Center for the term of eighteen months for Breaking & Entering With Intent to Rape, ct. 1 and the Mercer County Correction Center for the term of eighteen months for Assault With Intent to Rape, ct. 2 to run consecutive to the sentence imposed on ct. 1. Said sentence to run consecutive to the sentence the defendant is presently serving at State Correction Institute, Dallas, Pennsylvania.

A penalty of $25 is imposed on each count on which the defendant was convicted unless the box below indicates a higher penalty pursuant to N.J.S.A. 2C:43-3.1.

( ) penalty imposed on count(s)..... is $....., respectively.

Total Fine ....., Total Restitution....., Total VCCE Penalty.....

Installment payments, if applicable, are due at the rate of $..... per.....

IT IS FURTHER ORDERED THAT THE SHERRIF DELIVER THE DEFENDANT TO THE AFORENAMED INSTITUTION TO SERVE HIS SENTENCE.

STATEMENT OF REASONS REQUIRED BY
R. 3:21-4(e) APPEARS ON THE REVERSE SIDE

A.O.C., Form No. LR-35 1/78 Rev. 2/81

cc: Chief Probation Officers
AOC, Sentencing Research Project
Department of Corrections (where defendant sentenced to state correctional institution)

ATTORNEY FOR DEFENDANT
Upon entry of Guilty Plea or Conviction
J. Stewart Husid, Esq. (P.D.)
At time of Sentencing

/s/ Albert E. Driver, Jr. County Clerk

October 9, 1981 Date

Defendant to receive R. 3:21-8 credit
for time spent in custody
From Oct. 29, 1976 to July 4, 1977
Days credit 249

STATEMENT OF REASONS, R. 3:21-4(e)

Defendant was previously sentenced October 29, 1976 on two offenses with underlying sexual motivations and at that time due to his lack of prior record the court imposed a minimal custodial sentence (36 months in the Mercer County Correction Center and suspended the service of 24 months) and placed defendant on two year probation. During that probationary period, within less than a year of the commencement of probation, he was arrested in Pennsylvania and charged with additional sexual offenses (he was subsequently found not guilty). Thereafter, in March 1979 he was charged with a number of offenses involving assaultive conduct and sexual charges and conficted and is presently serving 5-10 years prison sentence in that State.

The above recited history clearly leads to the conclusion that this court's original trust in the defendant's representations of change in his criminal ways and hopes of rehabilitation were misplaced and he, in fact, has made a mockery of the original probationary sentence imposed. As a result of his recent conviction in Pennsylvania, the

defendant was found guilty of violation of his probation in this matter under 2c:45-4(b) and the Court therefore concluded that the balance of his original sentence (24 months) at the Mercer County Correction Center should be served in order to deter the defendant from future criminal intrusions on society and as punishment and that said sentence should be served consecutively to any sentence he is presently serving in the Commonwealth of Pennsylvania.

/s/ Richard J. S. Barlow, Jr., J.S.C.
Judge

STATE OF NEW JERSEY

County of Mercer

(Clerk's Seal of the
County of Mercer)

Office of the Clerk of Mercer County

I, Albert E. Driver, Jr. Clerk of the County of Mercer and also Clerk of the Mercer County Court—Law Division, in and for said County, the same being courts of record, holden therein, do hereby Certify that the foregoing is a true and correct copy of a certain Judgment in Re: State of New Jersey VS. Richard Nash, Indictment Number 495-74, as the same remains on record and on file in my said office.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at Trenton this 6th day of June A.D. 1983.

(SEAL)

/s/ Albert E. Driver, Jr.
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 81-401.

Dickinson R. Debevoise, USDJ

RICHARD NASH,

Petitioner, *pro se,*

v.

GLEN R. JEFFES, Superintendent,
State Correctional Institution at Dallas,

Respondent.

O R D E R

(Filed July 24, 1981)

Respondent, Glen R. Jeffes, through the offices of the Mercer County Prosecutor, having filed a statement pursuant to the order of this Court filed June 24, 1981, and it appearing from such statement that this action should be stayed pending completion of the state court proceeding referred to in that statement,

IT IS, on this Twenty-fourth day of July, 1981, ORDERED:

1. That this action shall be stayed pending completion of the state court proceeding referred to above, or until further order of the Court;

2. That petitioner shall be transported by agents of the State of New Jersey from the State Correctional Institution at Dallas, Pennsylvania to the Mercer County Detention Center in Trenton, New Jersey for the purpose of consulting with his attorney regarding the hearing or

hearings to be conducted in the state courts of New Jersey, said hearings to include a hearing on the validity of the detainer which is the subject of this suit and, if found to be authorized by the state court, a hearing on the violation of probation charge which is the subject of such detainer. Upon completion of any such hearing or hearings petitioner is to be remanded by agents of the State of New Jersey back to the custody of Glen R. Jeffes, Superintendent of the State Correctional Institution at Dallas, Pennsylvania to serve the remainder of his existing Pennsylvania sentence at said Institution or under its control or authority.

3. Upon conclusion of the above-mentioned hearing or hearings and all appeals from the judgments entered therein petitioner may move to terminate the stay provided for above.

4. Notwithstanding said stay, either party may apply to the Court for such further action as may be appropriate or necessary.

/s/ Dickinson R. Debevoise
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 81-401.

RICHARD NASH,
Petitioner, *pro se*,

v.

GLEN R. JEFFES, Superintendent,
State Correctional Institution at Dallas,
Respondent.

OPINION

(Filed June 24, 1981)

DEBEVOISE, District Judge.

Appearances: Mr. Richard Nash, No. M-2353
State Correctional Institution
Housing Unit "C"
Drawer "K"
Dallas, Pennsylvania 18612

Philip S. Carchman, Esquire
Prosecutor of Mercer County
Mercer County Court House
South Broad and Market Streets
Post Office Box No. 8068
Trenton, New Jersey 08650

By: James A. Waldron, Jr., Esquire
Assistant Mercer County Prosecutor

Petitioner, Richard Nash, is serving a five to ten year sentence in the State Correctional Institution at Dallas, Pennsylvania. On March 14th, 1979 he was convicted, after a bench trial, or burglary, involuntary deviate sexual intercourse and loitering. He was sentenced on July 13, 1979.

On March 6, 1980 he filed, pursuant to 28 U.S.C. § 2254, a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania, seeking dismissal of a detainer for violation of probation which the State of New Jersey had lodged against him. In essence, petitioner asserted that he had repeatedly requested the New Jersey officials to transfer him to Mercer County, New Jersey, for the purpose of resolving the detainer, and that the Mercer County officials had failed to comply with his requests.

The events which had taken place prior to March 6, 1980 can be ascertained from the petition and from other papers filed by petitioner and respondent. There does not appear to be a substantial dispute as to these events.

On June 21, 1976 petitioner pleaded guilty to Count I (breaking and entering with intent to rape) and Count II (assault with intent to rape) of a New Jersey indictment. On October 29, 1976 the New Jersey court sentenced petitioner to eighteen months at the Mercer County Correction Center on each Count, the sentences to run consecutively. The Court suspended twenty-four months of the sentence and petitioner served a twelve-month term. Upon release from the Correction Center petitioner was placed on probation. While on probation he was charged, in Pennsylvania, with the offenses of which he was ultimately convicted.

Petitioner was arrested and imprisoned pending his trial. On June 21, 1978 New Jersey filed a detainer against petitioner, charging him with violation of probation. As mentioned above, petitioner was tried and convicted on the Pennsylvania charges on March 14, 1979 and sentenced on July 13, 1979.

Petitioner asserts, in his Reply to Respondent's Letter (hereinafter referred to), that during the period from February, 1979 until November 5, 1979 he sent one or more letters to New Jersey Judge A. Jerome Moore, Deputy Public Defender Gerald T. Foley, Commissioner of the New Jersey Department of the Public Advocate Stanley C. Van Ness, Assistant Deputy Public Defender Ellen Shiever, Mercer County Prosecutor Anne Thompson, Mercer County Probation Officer Judy Giordano, Deputy Public Defender Theodore Fishman, Chief Mercer County Probation Officer Holloway, and Mercer County Assignment Judge George Y. Schoch. In these letters, petitioner alleges, he requested disposition of the detainer. According to him, the letters either went unanswered or the responses were not helpful.

Petitioner further asserts that on December 6, 1979 a Mr. Rusnik of the State Correctional Institution at Dallas informed him that the New Jersey authorities "would pick him up in a couple of days if he would sign the Interstate Agreement forms."

Both Pennsylvania and New Jersey have adopted the Interstate Agreement on Detainers, 18 U.S.C. App. § 2; N.J.S.A. 2A:159A-1, *et seq.;* 42 Pa. C.S.A. §§ 9101, *et seq.* The Agreement gives a prisoner serving a sentence in one state and against whom a detainer is lodged by another state the right to request final disposition of the matter on account of which the detainer is lodged. N.J.S.A. 2A:159A-3(a) provides that the prisoner "shall be brought to trial within 180 days after he shall cause to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint". N.J.S.A. 2A:159A-3(d) provides that "[i]f trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice". N.J.S.A. 2A:159A-4(e) provides that "[i]f trial is not had on any indictment, infor-

mation or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice".

On December 6, 1979 petitioner executed Form II used under the Agreement on Detainers. This form was addressed to the Prosecutor of Mercer County and constituted a formal notice of petitioner's place of imprisonment and request for disposition of indictments, informations or complaints. On the same day, Pennsylvania authorities executed Form IV used under the Agreement on Detainers. This form likewise was addressed to the Prosecutor of Mercer County. It constituted an offer to deliver temporary custody of the petitioner to the Prosecutor and set forth pertinent information about the petitioner's custody status in Pennsylvania.

On December 14, 1979 the Mercer County Prosecutor's Office responded to petitioner's request by sending Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas. The form authorized two agents of the Mercer County Sheriff's Office to take custody of petitioner on December 20, 1979. The Sheriff's deputies went to the Correctional Institution but were informed there than on December 11, 1979 petitioner had been moved temporarily to a penal institution in Graterford, Pennsylvania.

On or about February 26, 1980 petitioner was returned to the Dallas institution, and on February 28 the Mercer County Prosecutor's Office sent a new Form VI to the State Correctional facility at Dallas. The form

designated March 10, 1980 as the date when petitioner would be taken into custody by the New Jersey officers. In the meantime, however, petitioner had filed his petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, seeking dismissal of the detainer. In his Reply to Respondent's Letter (hereinafter referred to) petitioner stated, "On March 3, 1980, Mr. Alters of the Dallas records office asked plaintiff if he would sign some more papers from N.J., but plaintiff refused and informed Mr. Alters that he was filing a Petition for a Writ of Habeas Corpus in the Luzerne County Court . . ." The State Correctional facility officials notified the Mercer County Prosecutor's Office of this development and, consequently, no agents were sent to bring petitioner to Mercer County.

The district court (Middle District of Pennsylvania) granted petitioner leave to proceed *in forma pauperis* under 28 U.S.C.A. § 1915(a), ordered the respondent, Glen R. Jeffes, Superintendent of the State Correctional Institution at Dallas, to show cause why a writ of habeas corpus should not be granted and gave petitioner leave to file a traverse to respondent's answer to the order to show cause.

Respondent answered by submitting a letter of an Assistant Mercer County Prosecutor describing the events recited above. This letter referred to the second attempt of the Mercer County Prosecutor's Office to take custody of petitioner, stating, "This time, Mr. Nash chose to contest the legality of the detainer in your court rather than return to Mercer County. Again, this office is prepared to effectuate Mr. Nash's transfer here [Mercer County] if the instant petition is dismissed."

Petitioner filed a Reply to Respondent's Letter in which he described his communications to various New Jersey officials between February 1 and November 5, 1979, and in which he described his refusal to sign additional forms prescribed by the Agreement on Detainers.

On November 18, 1980 the district court (Pennsylvania) issued a memorandum opinion. The Court noted that although petitioner referred to habeas corpus petitions instituted in the Pennsylvania courts he did not state that he had exhausted his state judicial remedies in the New Jersey courts. The Court referred to Article V(c) of 18 U.S.C. App. § 2 (which finds its counterpart in N.J.S.A. 2A:159A-5(c)):

> (c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

Under the statute, the District Court found, the appropriate court to determine whether the detainer should be dismissed was the New Jersey state court, citing *Lovell v. Arnold*, 391 F. Supp. 1047 (M.D. Pa. 1975). The Court ordered petitioner to amend his petition to detail his efforts directed toward exhaustion of remedies in the New Jersey state court.

On November 21, 1980 petitioner filed a petition for habeas corpus in the New Jersey Superior Court, seeking

dismissal of the detainer. He advanced in rather general terms the same grounds he had advanced in the federal habeas corpus proceeding, referring specifically to letters he wrote to the New Jersey Public Advocate's Office, the New Jersey Public Defender's Office, and the Mercer County Prosecutor, Probation Office and Assignment Judge. He did not disclose in his petition information concerning the December, 1979 through March, 1980 proceedings under the Interstate Agreement on Detainers. At the same time, petitioner asked the District Court to stay proceedings in the federal habeas corpus action until the New Jersey court had acted.

On December 9, 1980 petitioner filed an amended petition for habeas corpus. In it he stated that on December 3, 1980 his New Jersey state court petition for a writ of habeas corpus had been denied and returned to petitioner "along with a cover letter from the Honorable George Y. Schoch, A.J.S.C., stating, that there is no basis for the issuance of such writ because the petitioner has failed to comply with the Interstate Agreement on Detainers".

On February 3, 1981 the District Court for the Middle District of Pennsylvania filed a memorandum opinion. After briefly describing the history of the case, the Court stated that it "will not comment on the apparent difficulties surrounding the issue of whether Nash did give proper notification to the Mercer County official and whether that notification was sufficient to trigger the applicable provisions of the IAD. The appropriate Court to decide this question is the New Jersey State Court." The District Court also stated that it lacked in personam jurisdiction over the authorities in Mercer County and would be unable to direct them to grant petitioner relief from the

New Jersey detainer. It pointed out that the Mercer County Prosecutor's Office filed the answer to the petition and that an official of that County would appear to be the proper respondent. The Court concluded that the United States District Court for the District of New Jersey would be in a better position to dispose of the matter and thereupon entered an order pursuant to 28 U.S.C. § 1406 transferring the case to this District.

The matter was referred to the Honorable John W. Devine, United States Magistrate, pursuant to General Rule 40A, for his preliminary review and report and recommendation to this Court as to whether a hearing is warranted. On March 26, 1981 respondent, through the office of the Mercer County Prosecutor filed an answer.

On March 31, 1981 Judge Devine filed his report and recommendation. He noted that petitioner's application for habeas corpus in the New Jersey court was denied on Decmber 3, 1980 but that petitioner has not appealed therefrom. He concluded "that petitioner has not exhausted state remedies in accordance with 28 U.S.C. § 2254(b). *Picard v. Connor,* 404 U.S. 270 (1971). Petitioner may still endeavor to do so. N.J.S. 2A:159A-3. This petition should be dismissed without evidentiary hearing, *Townsend v. Sain,* 372 U.S. 293 (1963), or the issuance of a certificate of probable cause. See *Lovell v. Arnold,* 391 F. Supp. 1047 (M.D. Pa. 1975)."

On April 2, 1981 petitioner filed a motion for entry of default because respondent had not filed his answer within the time prescribed by the Magistrate's order; it was ten days late.

On April 8, 1981 petitioner filed objections to the Magistrate's report and recommendation, and on May 28, 1981 filed supplemental objections.

In these responses petitioner stated that until late 1979 he was not aware of the Interstate Agreement on Detainers but, nevertheless, beginning in February, 1979 he had sought to dispose of the Mercer County detainer. He asserted that the 180-day period under the Agreement began on May 23, 1979 when the Mercer County Probation Officer wrote to him as follows: "I spoke to the Honorable A. Jerome Moore, our criminal assignment judge, and he informed me that we would take no action concerning the detainer until after you are sentenced in Montgomery County . . . I would suggest that you write to Ms. Giordano after you are sentenced."

Petitioner's response to the Magistrate's report and recommendation further states that he followed this recommendation and, one week after he was sentenced, he informed Ms. Giordano, requesting disposition of his detainer. According to petitioner, Ms. Giordano wrote him and stated: "As soon as you are assigned a Public Defender in New Jersey, there will be a hearing in the Court of the Honorable Richard J. S. Barlow, Jr.," No hearing was ever scheduled, nor was any other action taken despite petitioner's repeated requests.

Referring to the denial of petitioner's New Jersye habeas corpus petition, petitioner's response to the Magistrate's report and recommendation asserted that he was never given a hearing nor was he advised of the proper proceeding for filing a notice of appeal. A copy of the December 3, 1980 letter disposing of the state court peti-

tion accompanied petitioner's objections. It states, in its entirety:

> Dear Mr. Nash:
>
> I acknowledge receipt of your 'Petition for Writ of Habeas Corpus'. There is no basis for the issuance of such a Writ as you have not complied with the requirements of N.J.S.A. 2A:159A-1 et. seq. I enclose for your information photocopies of the applicable Statute.
>
> Your Petition is denied.

There is no indication whether a formal order was ever entered or whether this letter was intended to constitute such an order.

According to petitioner, the consequences of the detainer are not simply to prevent his release until the authorities requesting the detainer have had an opportunity to try him. The mere existence of the detainer severely limits the programs and activities in which an inmate may participate. It is for that reason that he is given the right to dispose of detainers.

In the present case the Magistrate was clearly correct in his conclusion that petitioner has not exhausted his state remedies. This would ordinarily require dismissal of the present proceedings until petitioner presents the issues raised in this case to the state courts.

However, the allegations contained in petitioner's objections to the Magistrate's report and recommendations throw new light upon his earlier pleadings. If true, they suggest that petitioner made a request for disposition of the New Jersey detainer, perhaps as early as July, 1979, that he was promised a hearing on such request in August

of 1979, and that he was never given a hearing. Further, if the new allegations are true, it appears that petitioner may never have been given a hearing on his November, 1980 petition for habeas corpus filed in the New Jersey court, and that his petition was dismissed without any explanation as to the manner in which he had failed to comply with N.J.S.A. 2A:159A-1, *et seq.*, and perhaps without the entry of a formal order from which an appeal could have been taken.

It is quite apparent that petitioner is entitled to a prompt hearing upon the question whether his 1979 communications to the New Jersey and Mercer County officials constituted a notice of his place of imprisonment and request for a final disposition of the detainer under N.J.S.A. 2A:159A-3(a) and, if so, whether the failure of the New Jersey and Mercer County officials to proceed as required by the Interstate Agreement on Detainers requires dismissal of the detainer. The fact that in July and August, 1979 petitioner was unaware of the existence of the Agreements on Detainers and the fact that he did not use the forms prepared by state authorities to implement the Agreement would seem to be a matter of no consequence.

A full hearing might well disclose that in the circumstances of this case an exception to the requirement of exhaustion of state remedies mandated by 28 U.S.C. § 2254(b) would be applicable. This precludes dismissal without such a hearing. However, in view of the desirability of having the substantive issues decided in the state courts a full hearing in this Court will be deferred for a short period in order to give the state courts an opportunity to accord petitioner a speedy and full hearing on all the issues which he has raised in all of the papers he

has filed in this Court. The extraordinary delays which petitioner has encountered to date require that this Court defer to the state courts only if those courts are in a position to provide a hearing and appellate review on a highly accelerated basis.

To that end, the Prosecutor of Mercer County (who has answered on behalf of respondent and who will be joined formally as a party should a hearing in this matter be required) is requested to file, within thirty days of the date of this opinion, a statement setting forth:

1) What state proceeding, if any, is available in which petitioner will be heard on the matters raised herein.

2) A date prior to which the hearing will be held. Unless petitioner can be heard within sixty days of the date hereof I would be inclined to proceed with the action in this Court.

3) Whether the Public Defender or other counsel has been appointed to represent petitioner in that proceeding.

4) Whether any appellate review of the determination can be accelerated.

Upon receipt of that statement this Court will decide whether a formal hearing here can be further delayed.[1]

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1. In view of the fact that the respondent, Glen R. Jeffes, is not a proper party and that the answering party, the Prosecutor of Mercer County, has not yet been formally joined in this action, the ten-day delay in filing an answer does not justify an entry of default. Therefore, petitioner's motion for entry of default will be denied.

The Court will enter an order in conformity with the foregoing.

Dated: June 23, 1981.

/s/ Dickinson R. Debevoise
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 81-401.

Dickinson R. Debevoise
United States District Judge

RICHARD NASH,

Petitioner, *pro se,*

v.

GLEN R. JEFFES, Superintendent, State Correctional Institution at Dallas,

Respondent.

ORDER

(Filed June 24, 1981)

Petitioner, Richard Nash, seeks issuance of a writ of habeas corpus pursuant to the provisions of 28 U.S.C. § 2254. He is incarcerated in the State Correctional Institution at Dallas, Pennsylvania and attacks the legality of a detainer filed against him by the State of New Jersey.

The cause was referred to the Honorable John W. Devine, United States Magistrate, pursuant to General Rule 40A, for his preliminary review and report and recommendation as to whether a hearing is warranted.

The United States Magistrate filed a report and recommendation, and thereafter petitioner filed objections and supplemental objections to the report and recommendation.

After reviewing the entire record, the report and recommendation, and the objections and supplemental objections, it is apparent that although petitioner has not exhausted his state remedies, certain additional facts alleged in the objections and supplemental objections raise a factual issue as to whether there is an absence of State corrective process or circumstances rendering such process ineffective to protect the petitioner's rights.

For the reasons set forth in the opinion filed simultaneously herewith, IT IS, on this Twenty-fourth day of June, 1981, ORDERED as follows:

1. The Prosecutor of Mercer County is requested to file (with a copy served upon petitioner) within thirty (30) days of the date hereof a statement setting forth:

a. What State proceeding, if any, is available in which petitioner will be heard on the matters raised herein;

b. A date prior to which such hearing will be held if petitioner requests such a hearing;

c. Whether the Public Defender or other counsel has been appointed to represent petitioner in that proceeding;

d. Whether any appellate review of the determination can be accelerated and an estimated time schedule for completion of all appellate review in the New Jersey Courts.

2. Upon the filing of said statement or the expiration of the thirty-day period, whichever is sooner, the

Court will determine whether this action should be stayed pending completion of state court proceedings or whether a hearing should be scheduled in this Court.

3. Petitioner's motion for an entry of default will be denied.

Dated: June 24th, 1981.

/s/ Dickinson R. Debevoise
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 80-0246

RICHARD NASH
Petitioner

v.

GLEN R. JEFFES
Respondent

MEMORANDUM
(Filed February 3, 1981)

Nash, an inmate at the State Correctional Institution at Dallas, Pennsylvania filed this action pursuant to 23 U.S.C. §2254.

In his petition, Nash seeks to dismiss a detainer lodged against him by the State of New Jersey. In support of this dismissal he alleges that the State of New Jersey has failed to comply with provisions of the Interstate Agreement on Detainers. (IAD) Specifically, Nash contends that he has repeatedly requested the New Jersey officials

to transfer him to Mercer County for the purpose of resolving the detainer lodged against him; the Mercer County officials have failed to comply with his requests. Nash argues that the detainer is no longer valid because New Jersey has failed to provide him with a speedy trial within one hundred and eighty days after he requested final disposition of the New Jersey charges.

In an order dated November 18, 1980, the Court noted that, in his petition, Nash referred to habeas corpus petitions which he filed in Pennsylvania State Courts, however, Petitioner did not allege that he attempted to exhaust his state judicial remedies in the New Jersey Courts. The Court informed Nash that under Article V(c) of the IAD,[1] the appropriate court to determine the validity of the challenged detainer would be the New Jersey State Court. Accordingly, the Petitioner was granted an additional fifteen (15) days from the November 18 date to file an amended petition. In this amendment, Nash was directed to detail his efforts directed toward exhaustion of remedies in the New Jersey State Courts.

On November 25, 1980, the Court received a letter from Petitioner in which he stated that he would begin an attempt to exhaust his New Jersey State Judicial remedies

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1. Article V(c) of the IAD provides in pertinent part that:

> in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the (180-day) period . . . ., *the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending* shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

on the issue of the validity of the New Jersey detainer. Petitioner requested the Court to "stay a final decision on this action" until he received a decision on his habeas corpus petition from the New Jersey State Court.

Nash informed the Court, on December 9, 1980, that he filed a petition for a writ of habeas corpus with the New Jersey Superior Court; this petition was denied. As a basis of its denial, Nash alleged that the Superior Court stated that he failed to give proper notification to the New Jersey official concerning his desire to invoke the pertinent provisions of the IAD. However, Nash did not furnish this Court with a copy of the New Jersey Court's disposition of his Habeas petition.

Respondent, in this action included, along with his answer, an affidavit of John F. Marut, a detective in Mercer County, New Jersey.[2] In his affidavit Mr. Marut states that:

> On December 6, 1979, Richard Nash signed form 2 of the Interstate Agreement on Detainers thereby requesting a transfer to Mercer County—for the purpose of resolving the pending charge of Violation of Probation. (A photocopy of Nash's letter was attached to Respondents' answer.)
>
> On December 14, 1979, I sent form 6 of the Interstate Agreement on Detainers to the State Correctional Institution, Dallas, Pennsylvania, in response to Mr. Nash's request, thereby authorizing two agents of the Mercer County Sheriff's office to transport Mr. Nash to Mercer County on December 20, 1979.

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2. The Mercer County Prosecutor's office filed the answer to Nash's Petition.

The Respondent states, at paragraph 3 in the cover letter to the answer, that "when properly notified of Mr. Nash's request by receipt of form 2, this office promptly responded."

This Court will not comment on the apparent difficulties surrounding the issue of whether Nash did give proper notification to the Mercer County official and whether that notification was sufficient to trigger the applicable provisions of the IAD. The appropriate Court to decide this question is the New Jersey State Court.

At this juncture, the Court is also persuaded by the reasoning in *Norris v. Georgia,* 522 F 2d 1006 (4th Cir. 1975) that it lacks in personam jurisdiction over the authorities in Mercer County, New Jersey, and therefore would be unable to direct them to grant Petitioner relief from the New Jersey Detainer. The United States District Court for the District of New Jersey would be in a better position to seek a broader record upon which to make a decision on Nash's petition. Therefore, the Court will order, pursuant to 28 U.S.C. §1406, that the case be transferred to that Court.[3]

An order will be entered.

/s/ Richard P. Conaboy
United States District Court

DATED: February 3rd, 1981

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3. The Court is aware that an official from Mercer County appears to be the proper respondent to this action. However, this determination will be left to the Federal District Court of New Jersey to decide.

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 80-0246

RICHARD NASH
Petitioner

v.

GLEN R. JEFFES
Respondent

ORDER

(Filed February 3, 1981)

NOW this 3rd day of February, 1981, in accordance with the Memorandum this date filed,

IT IS ORDERED THAT:

1. This action is transferred to the United States District Court for the District of New Jersey.
2. The Clerk of the Court is directed to effect the transfer.

/s/ Richard P. Conaboy
United States District Judge

FILED
SCRANTON, PA.
FEBRUARY 3, 1981
DONALD R. BERRY, Clerk
Per.....

Certified from the record

Date: 2/5/81
Donald E. Berry, Clerk

Per /s/ (Illegible)
Deputy Clerk

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2711-76

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICHARD NASH,

Defendant-Appellant.

(Filed December 11, 1978)

Submitted December 5, 1978—Decided

Before Judges Lora and Michels

On appeal from Superior Court of New Jersey, Law Division, Mercer County.

Mr. Stanley C. Van Ness, Public Defender, attorney for appellant (Mr. Leonard J. Carafa, Assistant Deputy Public Defender, submitted letter brief).

Mr. John J. Degnan, Attorney General of New Jersey, attorney for respondent (Ms. Katherine F. Graham, Deputy Attorney General, submitted letter brief).

PER CURIAM

Defendant, pursuant to a plea bargain, pleaded guilty to charges of breaking and entering with intent to rape and assault with intent to rape. The State agreed to make no recommendation as to the sentence and not to request that bail be increased at the time of the plea. He was sentenced to an aggregate term of 36 months in the Mercer County Correction Center, 24 months suspended, with two years probation.

Our review of the record and presentence report leads us to conclude that defendant's contention that the sentences imposed are manifestly excessive, unduly punitive and an abuse of the trial judge's discretion, is clearly without merit. *R.*2:11-3(e)(2).

Affirmed.

A TRUE COPY
/s/ Elizabeth McLaughlin
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5261

RICHARD NASH,

Appellee

v.

GLENN R. JEFFES, PHILLIP S. CARCHMAN,
Mercer County Prosecutor,

Appellants

and

STATE OF NEW JERSEY, DEPARTMENT OF CORRECTIONS,

Intervenor

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges,* and DUMBAULD, *District Judge**

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* Honorable Edward Dumbauld, Senior District Judge for the Western District of Pennsylvania, sitting by designation. As to panel rehearing only.

The petition for rehearing filed by appellants and intervenor in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Circuit Judges Hunter, Weis, and Garth would grant rehearing.

By the Court,
/s/ Edward R. Becker
Judge

Dated: AUG 27 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5261

RICHARD NASH

vs.

GLEN R. JEFFES, Superintendent State Correctional Institute at Dallas.

Philip S. Carchman, Mercer County Prosecutor, Appellant

STATE OF NEW JERSEY, DEPARTMENT OF CORRECTIONS, Intervenor
(D. C. Civil No. 81-00401)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE —— DISTRICT OF NEW JERSEY — TRENTON

Present: GIBBONS and BECKER, *Circuit Judges*, and DUMBAULD, *District Judge**.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the —— District of New Jersey — Trenton and was argued by counsel January 26, 1984.

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* Hon. Edward Dumbauld, Senior Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the Order of the said District Court, entered March 23, 1983, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:
Sally Mvros
Clerk

July 10, 1984

Certified as a true copy and issued in lieu of a formal mandate on September 4, 1984.
Test: M. Elizabeth Furgeson
Chief Deputy Clerk, U. S. Court of Appeals for the Third Circuit.

(EXCERPT)

STATE OF NEW JERSEY
DEPARTMENT OF CORRECTIONS

Effective
7/15/80

STANDARDS 867. *AGREEMENT ON DETAINERS*
APPLICABLE TO: Division of Policy and Planning—
Bureau of Interstate Services
Division of Adult Institutions

A. *Introduction*

New Jersey Statutes Annotated 2A:159A-1 through 2A:159A-15 codify the Interstate Agreement on Detainers. The Agreement provides for cooperative procedures among signatory states whereby an inmate serving a term of imprisonment can dispose of out-

standing charges and filed detainers based on untried indictments, informations or complaints across state boundaries. The request to dispose of detainers can be initiated by the inmate on his own motion or on the motion of the prosecuting agency.

The goals of the Agreement, as specified in N.J.S. 2A:159A-1 are:

1.) To encourage the expeditious and orderly disposition of charges outstanding against a prisoner in another jurisdiction and the determination of the proper status of any and all detainers based on untired indictments, informations or complaints;

2.) to secure speedy trials of persons already incarcerated in other jurisdictions; and

3.) among party states, to facilitate proceedings with reference to such charges and detainers.

B. *Definitions*

See New Jersey Statutes Annotated 2A:159A-1 through 2A:159-15 for definitions of "State", "Sending State" and "Receiving State."

1. "Detainer" shall mean for the purposes of these procedures a warrant(s) which is filed against a person serving a term of imprisonment which is based on an *untried* indictment(s), information(s) or complaint(s) in another state. It will not mean an escape, parole or probation violation warrant which is not based on an untried indictment, information or complaint. (Escape warrants based on indictments fall under the purview of the Agreement.)

2. "Temporary Custody" shall mean the transference of inmate custody from the sending state to the receiving state for the sole purpose of

disposing of detainers filed against the inmate by the receiving state.

3. "Term of Imprisonment" shall mean a sentence imposed in accordance with law which results in a term of confinement to a county or state correctional facility after a conviction has been received.

C. *Objectives*

This Agreement permits signatory states to provide for temporary custody of prisoners to the receiving state for trial and the subsequent return of the prisoner to the sending state after trial. If a conviction which results in a term of confinement is received while in temporary custody as a result of a prisoner's request and such term has not expired, the Agreement provides for the return of the prisoner upon release by the sending state, to the custody of the receiving state without the necessity of fugitive and extradition proceedings. The specific objectives of the Agreement are:

1. Under Article III, the Agreement provides for temporary custody out of state of an inmate who, on his own motion, has sent a request for final disposition of an outstanding indictment, information or complaint. The inmate must be brought to trial by the out-of-state jurisdiction within 180 days of receipt of the inmate's request by the prosecuting authority.
2. The Agreement, under Article IV, provides for the temporary custody out-of-state of an inmate on a prosecutor's request. Trial must be commenced within 120 days from the date the inmate is received within the requesting state.

3. The Agreement ensures that a request for temporary custody will act as a request to dispose of all detainers on file in the sending state that are based on untried indictments, informations, or complaints in the receiving state.
4. The Agreement, under Article V, assures the right to a speedy and effective prosecution by guaranteeing the dismissal of the outstanding indictments, informations or complaints with prejudice if the terms of the Agreement are not met by prosecuting officials.

D. *Group Serviced*

The Agreement applies to inmates serving a term of imprisonment in the New Jersey Department of Corrections and the County Correctional facilities and jails. It does not apply to prisoners awaiting trial in county facilities or inmates in New Jersey correctional facilities awaiting final parole or probation revocation action. Conversely, the Agreement does apply to adult inmates serving a term of imprisonment in out-of-state correctional facilities, federal facilities, and out-of-state county facilities who have New Jersey detainers on file by prosecuting officials from within the State of New Jersey. It does not apply to prisoners serving a term of imprisonment out-of-state who have detainers lodged for pending New Jersey parole or probation violation action.

August 3, 1979

Montgomery County Prison

Richard Nash
35 E. Airy Street
Norristown, Pa. 19401

Dear Mr. Nash:

I am writing concerning the charge of Violation of Probation which is pending in the Mercer Court. Today I asked the Public Defender's Office to send you an application for their services. As soon as you are assigned a Public Defender in New Jersey, there will be a hearing in the court of the Honorable Richard J.S. Barlow, Jr. If you do not hear from the N. J. Public Defender's Office within a week, I suggest that you write to them. The address is: 216-220 South Broad Street, Trenton, New Jersey 08609.

Please contact me if you have any further questions.

Very truly yours,

HAROLD HOLLOWAY
Chief Probation Officer

Judith Giordano
Senior Probation Officer

JG:es

CHAPTER 159A
INTERSTATE AGREEMENT ON DETAINERS

Section

The agreement on detainers is hereby enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows:

AGREEMENT ON DETAINERS

The contracting States solemnly agree that:

ARTICLE I

The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

L.1958, c. 12, p. 33, § 1 (Art. I), eff. April 18, 1958.

2A:159A—2. Definitions

ARTICLE II

As used in this agreement:

(a) "State" shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending State" shall mean a State in which a prisoner is incarcerated at the time that he initiates a

request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.[1]

(c) "Receiving State" shall mean the State in which trial is to be had on an indictment, information or complaint pursuant to Article III[2] or Article IV hereof.

L.1958, c. 12, p. 33, § 1 (Art. II).

2A:159A—3. Request for final disposition of pending indictment, information or complaint; certificate of officer having custody; procedure; failure to commence trial; dismissal; waiver of extradition; escape

ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having juris-

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[1]Section 2A:159A—4.

[2]Section 2A:159A—3.

diction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers

and court in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notes, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request. L.1958, c. 12, p. 33, § 1 (Art. III).

2A:159A—4. Request for temporary custody or availability of prisoner; procedure; time for commencing trial; failure to try; dismissal

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with Article V (a) hereof[1] upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: and provided further that there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State pa-

[1]Section 2A:159A—5.

role agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of and proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

L.1958, c. 12, p. 33, § 1 (Art. IV).

2A:159A-5. Offer of temporary custody; procedure; duty of receiving state; nature of temporary custody; return of prisoner; running of sentence; custody of sending state; costs

ARTICLE V

(a) In response to a request made under Article III or Article IV hereof,[1] the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the State into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event

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[1]Sections 2A:159A—3, 2A:159A—4.

that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in 1 or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution of any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised,

the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the 1 or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

L.1958, c. 12, p. 33, § 1 (Art. V).

2A159A-6. Inability of prisoner to stand trial; tolling of time periods; inapplicability of agreement to mentally ill persons

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV[1] of

[1]Sections 2A:159A—3, 2A:159A—4.

this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

L.1958, c. 12, p. 33, § 1 (Art. VI).

2A:159A-7. Rules and regulations

ARTICLE VII

Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

L.1958, c. 12, p. 33, § 1 (Art. VII).

2A:159A—8. Effective date of agreement; withdrawal of state; effect on status of proceedings

ARTICLE VIII

This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or

by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

L.1958, c. 12, p. 33, § 1 (Art. VIII).

2A:159A-9. Liberal construction; severability of provisions

ARTICLE IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the Constitution of any party State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the Constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters.
L.1958, c. 12, p. 33 § 1 (Art. IX).

2A:159A-10. "Appropriate court," definition

The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this State, mean any court with criminal jurisdiction.
L.1958, c. 12, p. 42, § 2.

2A:159A-11. Enforcement of agreement; cooperation

All courts, departments, agencies, officers and employees of this State and its political subdivisions are

hereby directed to enforce the agreement on detainers and to co-operate with one another and with the other party States in enforcing the agreement and effectuating its purposes.
L.1958, c. 12, p. 42, § 3.

2A:159A-12. Delivery of prisoner

The warden or other official in charge of any penal or correctional institution in this State shall give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.
L.1958, c. 12, p. 42, § 4.

2A:159A—13. Escape from custody; offense; punishment

Escape from custody while in another State pursuant to the agreement on detainers shall constitute an offense against the laws of this State to the same extent and degree as an escape from the institution in which the prisoner was confined immediately prior to having been sent to another State pursuant to the provisions of the agreement on detainers and shall be punishable in the same manner as an escape from said institution.
L.1958, c. 12, p. 42, § 5.

2A:159A-14. Central administrator and information officer; designation; powers; tenure

Pursuant to said agreement, the Governor is hereby authorized and empowered to designate an officer or alternate who shall be the central administrator of and the information agent for the agreement on detainers and who, acting jointly with like officers of other party States, shall have power to formulate rules and regulations to carry out more effectively the terms of the agreement, and shall serve subject to the pleasure of the Governor.
L.1958, c. 12, p. 42, § 6.

2A:159A-15. Transmittal of copies of act

Duly authenticated copies of this act shall, upon its approval, be transmitted by the Secretary of State to the Governor of each State, the Attorney-General and the Administrator of the General Services Administration of the United States, and the Council of State Governments.
L.1958, c. 12, p. 43, § 7.

No. 84-776 (1)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PHILIP S. CARCHMAN, ESQ.
MERCER COUNTY PROSECUTOR,

Petitioner,

v.

RICHARD NASH,

Respondent.

No. 84-835 (9)

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS

Petitioner,

v.

RICHARD NASH,

Respondent.

BRIEF IN OPPOSITION TO THE PETITIONS FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT SUBMITTED BY THE MERCER COUNTY PROSECUTOR AND STATE OF NEW JERSEY, DEPARTMENT OF CORRECTIONS

JOSEPH H. RODRIGUEZ
Public Defender

LOIS DE JULIO
First Assistant Deputy Public Defender

JOHN BURKE III
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20 Evergreen Place
East Orange, New Jersey 07018

Attorneys for Respondent

33 pp

No. 84-776

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v.

RICHARD NASH,

Respondent.

No. 84-835

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS

Petitioner,

v.

RICHARD NASH,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS
AND TO PROCEED ON TYPEWRITTEN PAPERS

The Respondent, Richard Nash, asks leave to file the attached Brief in Opposition to the Petitions for Writ of Certiorari from the decision of the United States Court of Appeals for the Third Circuit, without prepayment of costs, to proceed in forma pauperis pursuant to Rule 46, and to proceed on typewritten papers pursuant to Rule 47.3. Respondent has previously been found to qualify for the services of the Office of the Public Defender at every stage of the proceedings in the courts of the State of New Jersey. Respondent's affidavit in support of this motion is attached hereto.

JOSEPH H. RODRIGUEZ
Public Defender

EOIS DE JULIO
First Assistant Deputy Public Defender
Counsel of Record

JOHN BURKE III
Assistant Deputy Public Defender
Counsel for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1984

No. 84-776

PHILIP S. CARCHMAN,

Mercer County Prosecutor,

Petitioner,

v.

RICHARD NASH,

Respondent.

No. 84-835

STATE OF NEW JERSEY,
Department of Corrections,

Petitioner,

v.

RICHARD NASH,

Respondent.

I, RICHARD NASH, being duly sworn according to law, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therfore, I state that because of my poverty I am unable to pay the costs of said case or to give security therfore; and that I believe I am entitled to the redress in this case.

I am presently employed by Colortyme T.V. Rentals, 2881 Mt. Ephrain Avenue, Camden, New Jersey at a weekly salary of $165.00. Within the past twelve months, I have not received any other income, interest, dividend or payment. The balances both of my checking and savings account contain less than the amount of $10.00. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property. My fiance, Ms. Jacqueline Kerlin, is dependent upon me for support.

During all of the proceedings below, I qualified for representation by the Public Defender of New Jersey. I represent that I am still qualified for representation by that office pursuant to its eligibility standards.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

RICHARD NASH

Subscribed and Sworn to before
me this 12th day of December 1984.

A Attorney at Law
State of New Jersey

QUESTIONS PRESENTED FOR REVIEW

1. Since the decision of the Third Circuit Court of Appeals is distinguishable from the decision of the Court of Appeals for the Ninth Circuit in Hopper v. United States Parole Commission, 702 F.2d 842 (1983), should this Court grant the writ of certiorari in the absence of a direct conflict between Federal Courts of Appeal?

2. Is it not premature to decide that there exists a question of national importance where there is no direct conflict with seven of the jurisdictions cited by the Petitioner and no indication that the decision of the Third Circuit disrupts the administration of the law?

3. Since the State treated Respondent's letters as a request for a final disposition and hearing under Article III of the IAD, was he not excused from strict compliance with the formal notice requirements of the Act?

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STATEMENT OF THE CASE

While serving a New Jersey sentence of probation, Richard Nash was arrested in Montgomery County Pennsylvania on June 13, 1978. Subsequently, on June 21, 1978, the Mercer County Probation Department of the State of New Jersey filed a detainer against Nash charging him with a violation of probation. On March 14, 1979, Nash was convicted of all Pennsylvania charges and, on July 13, 1979, sentenced to a minimum of 5 years and a maximum of 10 years to be served at the State Correctional Institution at Dallas, Pennsylvania.

On April 13, 1979, Nash wrote a letter to the Mercer County Prosecutor's Office requesting advice as to what he should do to dispose of the detainer filed against him. Although the letter did not specifically refer to the Interstate Agreement on Detainers, the request was clear. In a reply letter dated May 16, 1979, the Prosecutor's office claimed not to have jurisdiction over the matter and advised Mr. Nash to contact his New Jersey Probation Officer.

On May 17, 1979, relying upon this advice, Mr. Nash wrote a letter to the Mercer County Probation Office. On May 23, 1979 Probation Officer Robert A. Hughes responded. Mr. Nash was informed that his request for disposition of the charge had been conveyed to Judge A. Jerome Moore, J.S.C., and that Judge Moore had stated that no action would be taken by the State on the detainer until Mr. Nash had been sentenced. The letter advised Nash to contact the Probation Office after he was sentenced.

On July 20, 1979, seven days after he was sentenced, Nash wrote the Mercer County Probation Office and renewed his request for a final disposition of the charge. On August 3,

1979, Probation Officer Judith Giordano replied that a probation revocation hearing would be held in the court of the Honorable Richard J. S. Barlow, Jr. as soon as Mr. Nash was appointed a Public Defender.

No hearing having been scheduled, on November 5, 1979, Nash wrote to the Chief Probation Officer of Mercer County explicitly requesting final disposition of the probation violation charge on the basis of the Interstate Agreement on Detainers Act and stating that the Pennsylvania Bureau of Corrections had been asked to attach a certificate. A copy of this letter was sent to Judge George Y. Schoch, the Assignment Judge of the Superior Court of New Jersey, Mercer County. Judge Schoch referred Nash's letter to the Mercer County Prosecutor's Office with an attached note "suggesting" Mr. Nash was invoking the terms of the Interstate Agreement on Detainers.

On December 6, 1979, Nash executed Form II under the Interstate Agreement on Detainers formally requesting transfer to Mercer County to resolve the probation violation charge. This form was delivered to the Mercer County Prosecutor along with Form IV used under the Interstate Agreement on Detainers as an offer to deliver temporary custody of the prisoner to the Prosecutor.

On December 14, 1979, the Mercer County Prosecutor's Office delivered Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas. The form authorized two agents of the Mercer County Prosecutor's Office to take custody of the prisoner on December 20, 1979. The Mercer County Officers arrived at Dallas on the appointed date, but were informed that Nash had

been temporarily transferred to the prison facility at Graterford on December 11, 1979. No attempt was made to take custody of Nash during his confinement at Graterford.

On February 28, 1980, after Nash had been returned to Dallas, Mercer County executed a new Form VI. The form designated March 10, 1980 as the date when Nash would be taken into custody. Nash refused to sign additional papers to effectuate his transfer to New Jersey.

On March 6, 1980, Nash filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania seeking dismissal of the detainer. An amended petition was filed on December 9, 1980. On February 3, 1981, the District Court for the Middle District of Pennsylvania transferred the case to the United States District Court of the District of New Jersey. On June 23, 1981, the Honorable Dickinson R. Debevoise, U.S.D.N.J., ordered that Nash's federal action be stayed until he had exhausted State remedies.

On August 24 and 25, 1981, the Honorable Richard Barlow, Jr., J.S.C. held a hearing in which he denied Nash's motion to dismiss the detainer. Judge Barlow found that Nash's Pennsylvania convictions constituted a violation of probation and re-sentenced him to two consecutive terms of eighteen months each to be served in the Mercer County Detention Center. Nash appealed to the Appellate Division of the Superior Court of New Jersey on the ground that the State had failed to provide a hearing within the statutorily prescribed time period. The Appellate Division affirmed the judgment of conviction on June 22, 1981; a petition for certification was denied by the New Jersey Supreme Court on November 12, 1981.

On January 4, 1983, Judge Debevoise held a hearing on the matter at the United States Court at Philadelphia. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. Section 2241 and 28 U.S.C. Section 2254. On March 7, 1983, the court issued an opinion dismissing the detainer lodged against Nash and nullifying his conviction of violation of probation. Nash v. Carchman, 558 F. Supp 641 (D.N.J. 1983). The court ruled that article III of the IAD is applicable to detainers based upon probation violation complaints, and that the State had violated Nash's rights.

The Mercer County Prosecutor appealed the decision of the District Court. During the pendency of the appeal, the State of New Jersey, Department of Corrections, moved to intervene on the ground that the opinion of the District Court invalidated one of its office policies. On June 29, 1983, the Court of Appeals granted the movant's request.

On July 10, 1984, the Third Circuit Court of Appeals affirmed the district court's ruling. The Third Circuit had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. Section 1291. A petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 27, 1984. The mandate was filed on September 4, 1984.

On November 5, 1984, Phillip S. Carchman, Mercer County Prosecutor, filed a petition for a writ of certiorari from the decision of the United States Court of Appeals for the Third Circuit. On November 20, 1984, the State of New Jersey, Depart of Corrections, filed a separate petition.

REASONS FOR NOT GRANTING THE WRIT

POINT ONE

THE DECISION OF THE COURT OF APPEALS HAS NOT CREATED A CONFLICT IN THE INTERPRETATION OF THE INTERSTATE AGREEMENT ON DETAINERS.

The decision of the Court of Appeals is not in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in Hopper v. United States Parole Commission, 702 F. 2d 842 (1983). Although the opinion is at odds with a small group of lower court cases, no question of national importance has yet arisen, nor has the administration of the law been disrupted. The request for review by this Court is premature and, in view of the eminently reasoned decision of the court below, unnecessary.

The Court of Appeals for the Third Circuit held that a detainer based upon a probation violation complaint is within the scope of the Interstate Agreement on Detainers. Nash v. Jeffes, 739 F.2d 878, 884 (3rd Cir. 1984).[1] In Hopper, the Court of Appeals for the Ninth Circuit held that a detainer based upon an "unadjudicated parole violation warrant' is not within the Act. Id. at 846. The two cases are not diametrically opposed as they are based upon distinctions between probation and parole.

Probation and parole are not interchangeable terms within the context of the IAD. Probation is exclusively a

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1. In the petition of the Mercer County Prosecutor, the holding of the Court of Appeals is persistently misrepresented as applying to parole as well as to probation violation detainers.

judicial matter within the jurisdiction of the court, while parole is an administrative matter within the jurisdiction of an administrative body, the State Parole Board. See, N.J.S.A. 2C:45-1 et seq; N.J.S.A. 30:4-123 et seq. A detainer based upon a charge of probation violation is filed by the prosecutor in whose county the sentence of probation was imposed. A detainer based upon a charge of parole is filed by the State Parole Board. N.J.A.C. 10A:71-7.2(b). A revocation of probation is heard before the court which imposed the sentence of probation, while the revocation of parole is heard before the State Parole Board or a parole officer. See, N.J.S.A. 2C:45-4; N.J.S.A. 30:4-123.60 and N.J.A.C. 10A:71-7.12. Dispositional alternatives available to a court in the event of revocation are not available to the State Parole Board. Compare, N.J.S.A. 2C:45-3(b) with N.J.A.C. 10A:71-7.16.

These practical distinctions render the act eminently more suitable to a detainer based upon a probation violation complaint. Specifically, the notice requirements of Article III serve to inform the correct authorities of the prisoner's request for a hearing, and resolution of the charge accomplishes the overall aims to be achieved by the Act. The same effect is not obtained with an application of the IAD to a parole violation detainer.

Article III requires a prisoner to deliver his demand for a final disposition of the charge underlying the detainer to "the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction." N.J.S.A. 2A:159A-3(a).

Although this notice requirement informs those with jurisdiction over a probation violation complaint of the request for final disposition, it does not do so for a parole violation complaint. The Court of Appeals noted:

> In the probation violation context, the notice of the prosecutor and the judge required by Article III places the appropriate officials on notice of the prisoner's request for adjudication under the IAD. We note that if this were a parole violation rather than a probation violation, the notice required by the IAD might not be appropriate to inform the state officials with jurisdiction over the outstanding charge.

Nash v. Jeffes, 739 F.2d 878, 883, n.11 (3rd Cir. 1984) Because the operative provisions of the IAD can be so readily applied to dispose of detainers based on probation violations, the Court concluded that the legislature must have intended the act to apply.

The IAD is designed to alleviate the adverse consequences engendered by detainers which block a prisoner's access to rehabilitative programs. L. Abramson, Criminal Detainers, at p. 93 (1979); Note, Convictions - The Right To A Speedy Trial And The New Detainer Statutes, 18 Rutgers L. Rev.828, 832 (1974). Restrictions are placed upon inmates against whom a detainer is lodged under the assumption that they pose a greater escape risk than other inmates since they face the possibility of serving a future sentence of unknown duration. Note, Detainers And The Correctional Process, 4 Wash. U.L.Q. 417, 419 (1966).[2] The uncertainty surrounding

2. These restrictions are placed upon inmates without regard to the nature of the charge underlying the detainer. 4 Wash. U.L.Q. 417,419, supra.

the future of a prisoner against whom a detainer is lodged prevents prison officials from designing an effective program of rehabilitative treatment. Id. at 421 and 422. Resolution of the charge removes the restrictions placed upon the inmate, since the terms of the prisoner's future are made certain. Because a greater degree of uncertainty is cast over the future of a prisoner by an unresolved probation violation complaint, the aim of the legislation is more effectively accomplished when the act is applied to that kind of detainer.

At a revocation hearing, a court must first determine whether the terms of probation were violated. Although conviction of another crime raises a presumption of violation, the court is not required to revoke probation. N.J.S.A. 2C:45-3(4). As one commentator has noted:

> there is a possibility of prejudice where the new conviction is for a minor offense that may not warrant revocation, and delay complicates resolution of the revocation issue. L. Abramson, Criminal Detainers, at 86 (1979).

In the event a court decides to revoke probation, it is empowered to impose any sentence it could have imposed upon the original conviction, or to continue probation. Application of White, 18 N.J. 449, 114 A.2d 261 (1955). Any sentence imposed may be ordered to run either concurrently or consecutively to the out-of-state sentence the prisoner is then serving. Out of the total range of dispositions that may be imposed, many may serve to clarify the future of the prisoner and obviate the restrictions placed upon him by the detainer. When the complaint is based upon a charge of technical, non-compliance with the terms of probation, the early revocation hearing enables the prisoner to

attack the charge with fresh evidence. Nash v. Jeffes, 739 F.2d. 878, (3rd Cir. 1984).[3] Thus, petitioner's "fundamental assumption" that there is no interest in speedy resolution of probation violation detainers is erroneous.[4]

Not as much is at stake for the prisoner at the parole revocation hearing. A lesser array of dispositional alternatives restricts the discretion of the Parole Board N.J.A.C. 10A:71-7.16. The Board can only determine whether to run the balance of the sentence, for which parole is revoked, either concurrently or consecutively to the intervening out-of-state sentence. In as much as the decision of the Parole Board is less likely to produce a result that would lift the restrictions imposed upon the inmate by the detainer, the aims of the IAD are not as well accomplished.

In Hopper, the Court of Appeals for the Ninth Circuit ruled that the IAD is not applicable to parole violation complaints. The decision rested upon implicitly recognized distinctions between parole and probation violation complaints. Since entirely different implications are raised by each in the context of the IAD, the decision of the Ninth

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3. Detainers of this sort are not uncommonly placed. See, e.g. Padilla v. State of Arkansas, infra. The petitioner's reliance upon Padilla ironically disproves its thesis that a detainer based upon a technical violation is likely to be rare.

4. Since there is no mechanism by which to apply the sentence on the probation violation retroactively, if the IAD is held not to apply, a judge would never be able to impose concurrent sentences and the prisoner would be denied the ensuing benefit.

Circuit is not in direct conflict with the decision of the Third Circuit Court of Appeals.

Three State Supreme Courts, Padilla v. Arkansas, 279 Ark 100, 648 S.W. 2d 797 (Sup. Ct. 1983); State v. Knowles, 275 S.C. 312, 270 S.E. 2d 133 (S.C. Sup. Ct. 1980); Suggs v. Hopper, 234 Ga. 242, 215 S.E. 2d 246 (Ga. Sup. Ct. 1975); and five State Appellate Courts, Irby v. State of Missouri, 427 So. 2d 367 (Fla. App. 1983), People ex rel. Capalongo v. Howard, 87 App. Div. 242, 453 N.Y.S. 2d. 45 (N.Y. App. Div. 1982); People v. Jackson, 626 P. 2d 723 (Colo. App. Ct. 1981); Blackwell v. State, 546 S.W. 2d 828 (Tenn. Crim. App. 1976); People v. Batalias, 35 App. Div. 740, 316 N.Y.S. 2d 245 (N.Y. App. Div. 1970), have found that a probation violation complaint is not included within the scope of the IAD.[5] None of these courts examined the legislative history of the IAD or supported their conclusions with persuasive analysis. One State Appellate Court and the Federal District Court below, however, have found that such a complaint is within the scope of the Act. Nash v. Carchman, 558 F.Supp. 641 (D.N.J. 1983); Gaddy v. Turner, 376 So.2d. 1225 (Fla. App. 1979), rev'd, Irby v. State of Missouri,

5. The petitioner falsely augments the magnitude of the conflict by reference to cases dealing with parole matters. See , Hernandez v. United States, 527 F. Supp 83 (W.D. Okla. 1981), Sable v. Ohio, 439 F. Supp. 905 (W.D. Okla. 1977), Cart v. DeRobertis, 117 Ill. App. 3d 587, 72 Ill. Dec. 848, 453 N.E. 2d 153 (Ill. App. 1983); Maggard v. Wainwright, 411 So. 2d 200 (Fla. App. 1982); Wainwright v. Evans, 403 So. 2d 1123 (Fla. App. 1981); Buchanan v. Michigan Department of Corrections, 50 Mic. App. 1, 212 N.W. 2d 745 (Mich. Ct. App. 1973). The petitioner's argument falsely presumes that the Third Circuit decision applies to parole violation detainers, as well as to probation violation complaints, which it clearly does not. The split of decision that does exist between the Third Circuit and eight state courts is not sufficiently serious to warrant intervention by this Court.

supra. The Court of Appeals rested its decision upon the cogent analysis of the District Court remarking that:

> Although the authority on the other side is entitled to considerable weight, the strength of the district court's analysis far exceeds that of the opinions reaching the opposite result. Nash v. Jeffes, 739 F.2d 878, 881 (1984).

The Court of Appeals carefully analyzed the legislative history of the act and also weighed the administrative burdens and costs its decision would impose upon the State. The Court found that the State's interests in minimizing costs did not outweigh the prisoner's interest in rehabilitation. Nash v. Jeffes, supra at 883.

At this time, it is premature to decide whether the decision of the Third Circuit will be disruptive of the administration of the Interstate Agreement on Detainers. The decision has accorded rights to prisoners under the IAD that were previously unrecognized. Technically, the decision is binding only upon authorities within the domain of the Third Circuit which have lodged detainers against out-of-state prisoners. This is not to suggest, however, that the opinion will not have influence elsewhere. Rather, it can be presumed that jurisdictions not presently in accord with the opinion of the Third Circuit will follow the decision, given its great precedential weight. Cuyler v. Adams, 449 U.S. 433 101 S. Ct. 703 (1981). Additionally, as this Court has noted in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, n.5 at 782, 1760 (1973), some amount of disruption inevitably attends any new ruling. In any event, the disruption would be minor because the decision is limited to probation violation complaints which can be readily handled

under the existing operative mechanisms of the act. Until other courts of equivalent jurisdiction rule otherwise, or until courts of lower jurisdiction indicate a refusal to follow the ruling of the Third Circuit, the claim that the decision of the Court of Appeals has disrupted the uniform administration of the law is premature.

POINT TWO

THE COURT OF APPEALS CORRECTLY INTERPRETED THE LEGISLATIVE HISTORY OF THE INTERSTATE AGREEMENT ON DETAINERS.

Relying upon the legislative history of the IAD, the Court of Appeals correctly interpreted the phrase "untried indictment, information or complaint" as used in Article III to include detainers based upon probation violation complaints.

In 1948, the Joint Committee on Detainers issued a report dealing with problems attending the use of detainers and recommended a set of guiding principles. See, Council of State Governments, Suggested State Legislation for 1956. United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834 (1978). Under the auspices of the Council of State Governments, the committee drafted several proposals concerning detainers. In 1957, the final draft was published as part of the Council's Suggested State Legislation Program. See Council of State Governments, Suggested State Legislation for 1957. Currently, the Interstate Agreement on Detainers has been adopted by forty-eight states, the District of Columbia and the Federal Government. Note, Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers, 83 Colum L.Rev 975, 975 n.1 (1983).

The Act was principally designed to alleviate the adverse effects of detainers upon prisoner's prospects of rehabilitation. Note, Convictions The Right to a Speedy Trial and the New Detainer Statutes, 18 Rutgers L. Rev. 828, 832 (1964). In 1956, the Council of State Governments

succinctly expressed the nature of this problem:

> "The prison administrator is thwarted in his efforts toward rehabilitation. The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment, when he is ready for return to society with an excellent possibility that he will not offend again. Instead, he often becomes embittered with continued institutionalization and the objective of the correctional system is defeated."

Council of State Governments, Suggested State Legislation for 1956, p. 60.

That Article III of the IAD was meant to comprehend and apply to all detainers, irrespective of the charges that underlie them, is obvious from the comments made by the Joint Committee in its "statement of aims" which included the following:

> I. Every effort should be made to accomplish the disposition of detainers as promptly as possible. This is desirable whether the detainer has been filed against an individual who has not yet been imprisoned or against an inmate of a penal institution. Prompt disposition of detainers is a proper goal whether the detainer has been filed by a local prosecutor, a state prison, a parole board, or a federal official. Detainers lodged on suspicion should not be permitted to linger without action. (Emphasis added.)
>
> III. Prison and parole authorities should take prompt action to settle detainers which have been filed by them. Prison officials and parole boards recognize that detainers create serious problems with respect to prisoners under their jurisdiction. Therefore, when such

> authorities file detainers against prisoners in other jurisdictions, they should cooperate fully to effect a prompt settlement of all detainers. They should promptly give notice as to whether they insist that the prisoner be returned at the end of his present sentence, or whether they will agree to a concurrent parole. Every effort should be made to cooperate in planning effective rehabilitation programs for the prisoner.

See, Council of State Governments, Suggested State Legislation for 1956, at 61. No distinction was made between detainers based upon probation violation complaints and those based upon other charges precisely because the drafters recognized the effects of both were equally pernicious.

In 1970, the Federal Government adopted the IAD. The federal legislative history echoes the same concern for prisoner's rights as the original legislative history of the Council of State Governments. In describing the need for the legislation, the Senate stated:

> The Attorney General has advised the committee that a prisoner who has had a detainer lodged against him is seriously disadvantaged by such action. He is in custody and therefore in no position to seek witnesses or to preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. What is more, when detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing. Although a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence, the damage to the rehabilitation program has been done because the institution staff has not had sufficient time to develop a sound pre-release program.

Senate Rep. No. 91-1356, 91st Cong., 2nd. Sess. (1970), U.S.

Code Cong. & Ad. News 4864, 4866. In addition to affording prisoners redress to a specific complaint, Congress also intended to revamp the rehabilitation policies of the Federal Penal System.

During passage of H.R. Bill 6951 in the House of Representatives, Representative Richard H. Poff from the State of Virginia remarked:

> ...If a defendant is uncertain as to whether he will have to serve another jail term, he is less likely to have the motivation to become successfully rehabilitated. This latter consideration is especially important in view of the fact that the basic purpose of the entire penal system is to prepare its inmates to reenter society as law abiding citizens. (emphasis added)
> Congressional Record: H.R. 6951, 91st Cong., 2nd Sess., 116 Cong. Record, 13997, 14000 (1970)

Representative Poff concluded "...in view of these considerations, I feel that the Interstate Agreement on Detainers benefits both defendant and prosecutor, as well as society generally." Id. at 14000.

Drawing upon the clear message of the legislative history, the Court of Appeals concluded that "the drafters of Article III were concerned with the need to settle outstanding charges against prisoners in order to enable the prisoners to participate in rehabilitation programs." Nash v. Jeffes, 739 F.2d 878, 882 (3d Cir. 1984). Support for this conclusion not only rests upon the legislative history, but also upon the legislative mandate to "interpret the terms of the act broadly," N.J.S.A. 2A:159A-9, the directive that the act shall apply to "all outstanding charges" against the prisoner, N.J.S.A. 2A:159A-1, and the broad policy objectives to be accomplished. For these

reasons, the Court stated, "We decline to adopt a technical interpretation of the relevant language of Article III." Nash v. Jeffes, supra, at 883.[6] Indeed, the legislative history instructs that the phrase was intended not to limit the scope of the Act but to make certain the detainer is supported by a minimally valid charge. Washington Note, 4 Wash. U.L.Q. 417, 417-418.

"Technical" interpretations of the terms of the IAD that result in a circumvention of the Act's purposes have been uniformly rejected. United States v. Mauro, 436 U.S. 340, 98 S. Ct. 1834 (1978); Tinghitella v. State of California, 718 F.2d 308 (9th Cir. 1983). In Mauro, this Court ruled a writ of habeas corpus ad prosequendum is equivalent to a "written request for custody of the prisoner" under the terms of the Act, in spite of the technical nuances of the Federal Court instrument. Id. at 361, 1848. The Court rejected the technical interpretation offered because it would skirt the aims of the Act. In Tinghitella, the Court of Appeals for the Ninth Circuit held that the term "trial"

---

6. The petitioner claims that the court misread the legislative history by misplaced emphasis upon the following commentary:

> Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or a parolee commits a new crime and is imprisoned in another state. (Council of State Governments Suggested State Legislation for 1957 at 74 (1956)). (Mercer County Prosecutor's Petition at 13-14; State of New Jersey Petition at 7.)

The petitioner's claim is not well-founded. First, the Court did not rely exclusively upon this commentary but upon the complete text of the historic material. Secondly, the definition given by the Council is not merely descriptive, as the petitioner suggests, but indicative of the scope the Act was intended to have.

encompassed sentencing as well as trial. In that case, the petitioner, after having been convicted of assault, absconded the State of California before he was sentenced. While imprisoned in Texas, he filed a request under the IAD to be returned to California for sentencing. California argued that Article III of the IAD was inapplicable because the detainer was not based upon an "untried indictment." The Court observed:

> The cases do not address the fact that the term "trial" in the speedy trial clause of the Sixth Amendment to the United States Constitution has been construed to include sentencing. Nor do they gainsay that the central policy foundations of the IAD support a broad construction of the term "trial", or that the IAD itself provides that it "shall be liberally construed to as to effectuate its purposes. (Cases and footnotes omitted). Id. at 311.

In the present case, the Court of Appeals rejected the technical interpretation offered by the State because it would have circumvented the aim of the Act to alleviate the adverse consequences of detainers.

The Act need not be amended to give it its intended meaning. One state, Kentucky, has amended its statute to apply to detainers based upon violations of probation and parole. Kentucky Revised Statutes Sec. 440.445. The Amendment provides in pertinent part:

> All provisions and procedures of KRS 440.450 shall be construed to apply to any and all detainers based on unheard, undisposed of, or unresolved affidavits and warrants charging violations of the terms of probation and parole. KRS 440.455(2).

The Amendment, however, does not indicate a short-coming in the original statement of the law, but rather reflects a

declaration of original intent. As one court has observed:

> "[The Kentucky Amendment] is simply declaratory of the intent and effect of the language of the uniform law ... which encompasses detainers based on complaints generally as well as indictment or information." Maggard v. Wainwright, 411 So. 2d 200, 203 (Fla. App. 1982), (dissenting opinion of Justice J. Wentworth).

Because the language of the statute is sufficiently definitive of the scope of the Act, legislative amendment is not needed.

POINT III

THE STATE OF NEW JERSEY FAILED TO COMPLY WITH THE PROVISIONS OF ARTICLE III OF THE INTERSTATE ARGEEMENT ON DETAINERS

Article III provides that a prisoner must be brought to trial within 180 days:

> ...after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction, written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint.

N.J.S.A. 2A:159A-3(a).

The notice provisions require that the prisoner file a written notice and request for final disposition of the detainer with the Prosecutor and Court. The written request must be accompanied by a certificate of the official having custody of the prisoner. N.J.S.A. 2A:159A-3(a). The certificate shall state "the term of the commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, time of parole eligibility of the prisoner, and any decisions of the State Parole agency." N.J.S.A. 2A:159A-3(a).

In this case, Respondent Nash did not strictly comply with the notice requirements of the statute. Although his written notice and request for final disposition were delivered to the prosecutor and appropriate court, they were not accompanied by a certificate from the official having custody of him at Dallas Prison in Pennslyvania.

The Court of Appeals excused his failure to strictly comply with the notice requirements because the failure was

directly attributable to "misleading information" given him by the State of New Jersey. Nash v. Jeffes, 739 F.3d 878, 884 (3rd Cir. 1984). Where the failure to strictly comply is the fault of one the jurisdictions involved rather than the prisoner, technical compliance is excused. See, Schofs v. Warden, FCI, Livington, 509 F. Supp 78, 82 (E.D.Ky. 1981); United States v. Hutchins, 489 F. Supp. 710, 714-15 (N.D. Ind. 1980). See also Pittman v. State, 301 A.2d 509 (Del. 1973), State v. Wells, 186 N.J. Super 497, 453 A.2d 236 (App. Div. 1982).

Respondent Nash wrote a series of letters to the Mercer County Prosecutor's office and to Judge Moore during the period April 1979 through August 1979 requesting the State to provide a probation revocation hearing. Nash v. Carchman, 558 F. Supp. 641, 647 (D.N.J. 1983). The Court of Appeals found that "Nash's letters were being treated as a request for disposition of the probation violation charge," by the State of New Jersey. Nash v. Jeffes, 739 F.2d 878, 875 (1984). Thus, Nash was found to have complied with the first prong of the notice requirement.

In a letter dated August 3, 1979, Mercer County officials advised Mr. Nash that:

> "As soon as you are assigned a Public Defender in New Jersey, there will be a hearing in the court of the Honorable Richard S. Barlow, Jr."

Nash v. Carchman, 558 F. Supp. 641, 647 (D.N.J. 1983). On the basis of this letter, the court concluded that "Nash was justified in taking no further action," and that the 180 day period for adjudication of the probation violation charge began running on August 3, 1979." Nash v. Jeffes, supra,at 885.

Although Respondent Nash complied with the formal notice requirements on December 6, 1979 by providing the State of New Jersey with the standard forms ordinarily used to make a request, by that time, as the District Court had noted, he had been "led to believe that . . . an effective demand for final disposition of the pending charges " had been made by the representation made to him in the August 3 letter. Nash v. Jeffes, supra, at 885.

The State of New Jersey failed to provide a hearing within the time period prescribed by the statute. Although the State had arranged for a transfer of custody to take place on December 20, 1979 at Dallas Prison, the transfer never took place because Mr. Nash was confined at Graterford Prison. The State's insinuation that Mr. Nash should be held accountable for the bungled transfer attempt is absurd. Regardless of the effort the State made to take custody of the prisoner, the State did not provide a hearing within the allowable time period. N.J.S.A. 2A:159A-3(a) and 3(d).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court to deny the petitions for writ of certiorari.

Respectfully submitted,
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No. 84-835 (4)
No. 84-776 (3)

In The
Supreme Court of the United States
October Term, 1984

STATE OF NEW JERSEY,
Department of Corrections,

Petitioner,

v.

RICHARD NASH,

Respondent.

PHILIP S. CARCHMAN,
Mercer County Prosecutor,

Petitioner,

v.

RICHARD NASH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

(All counsel listed on inside cover.)

Petition For Certiorari (84-835) Filed November 20, 1984
Petition For Certiorari (84-776) Filed November 5, 1984
Certiorari Granted January 14, 1985

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12 pp

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RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
2- 9-81	1	Order transferring action from Middle Dist. of Pennsylvania, filed, with the following documents enclosed:
	1a	Memorandum
	1b	Petition for writ of habeas corpus
	2	Order re in forma pauperis
	3	Petitioner's letter
	4	Statement re prison account
	5	Order re rule to show cause
	6	Letter of Mercer County Prosecutor
	7	Petitioner's reply
	8	Amendment to petitioner's reply
	9	Memorandum re amendment to petition
	10	Order for amendment to petition
	11	Petitioner's letter dated 11-20-80
	12	Amended petition for writ of habeas corpus
2- 9-81	13	Notice of Allocation and Assignment filed. (Trenton-Debevoise)
2-11-81	14	Order directing respondent Prosecutor of Mercer County to answer petition for writ of habeas corpus not later than 3-16-81 filed. 2-11-81. (Devine)
3-26-81	15	*Answer filed.* (state court proceedings submitted)
3-27-81	16	Certificate of service filed.
3-31-81	17	Report and recommendation filed. (Devine) (copies mailed)
4- 2-81	18	Plaintiff's motion for affidavit of default filed.
4- 8-81	19	Petitioner's objections to Magistrate's report and recommendation, filed
5-20-81	20	Supplement to petitioner's objections to Magistrate's report and recommendation, with proof of service annexed thereon, filed

DATE	NR.	PROCEEDINGS
6-23-81	21	Plaintiff's letter date 5-12-81 to Judge Debevoise, filed
6-25-81	22	OPINION filed 6-24-81. (Debevoise) (copies mailed)
6-25-81	23	Order directing Prosecutor of Mercer County to file a statement within 30 days and denying petitioner's motion for entry of default filed 6-24-81. (Debevoise) (copies mailed)
7-21-81	24	STATEMENT, with verification and certificate of service annexed thereon, filed 7-20-81
7-27-81	25	Order staying action pending completion of certain state court proceedings filed 7-24-81. (Debevoise) (copies mailed)
7-29-81	26	Petitioner's objections to respondents' reply to court mandate filed
8- 3-81	27	Order terminating action administratively without costs filed. (Debevoise) (copies mailed)
3-15-82	28	Plaintiff's motion to terminate stay and resume jurisdiction filed
4- 1-82	29	Certificate of service filed 3-29-82
4- 7-82		At call for hearing on pltf's motion to terminate stay and resume jurisdiction, the court reported motion to be decided on papers submitted pursuant to Rule 78. (Debevoise) (4-5-82)
4-13-82	30	Letter of plaintiff re: plaintiff's motion to terminate stay and resume jurisdiction filed 4-12-82

DATE	NR.	PROCEEDINGS
4-14-82	31	OPINION filed 4-12-82. (Debevoise) (copies mailed)
4-14-82	32	Order denying petitioner's motion to stay proceedings filed 4-12-82. (Debevoise) (copies mailed)
12- 9-82	33	Writ of habeas corpus as to pltf., on 12-28-82, filed. (Debevoise) copies to USM
1- 7-83	34	Order reinstating matter to trial list, filed 1-6-83. (Debevoise) (notice mailed)
1-13-83	35	Order of U.S.C.A. designating Philadelphia, Pennsylvania on 1-4-83 as designated place for hearing on petition for writ of habeas corpus filed 1-12-83. (Aldisert) (copies mailed)
1-17-83	36	Order Re-allocating case from Trenton to Newark filed. (Debevoise) (Notice Mailed)
3- 8-83	37	Opinion, filed 3-7-83. (Debevoise) (Granting petition for Writ of Habeas Corpus) copy to N.J. L. J.
3-23-83	38	Order granting petitioner's petition for Writ of Habeas Corpus, without costs, filed 3-21-83. (Debevoise) (notice mailed)
4- 7-83	39	Defendant's Notice of Appeal filed 4-4-83 at 3:55 p.m.
4- 7-83		Copies of defendant's notice of Appeal sent to U.S.C.A., Richard Nash, and James A. Waldron, Jr.
4-11-83	40	Copy of transcript purchase Order of habeas corpus hearing taken 1-4-83 at the U.S. Court House in Philadelphia, filed 4-8-83

DATE NR. PROCEEDINGS

5- 4-83 41 *Transcript* or hearing taken 1-4-83 in Philadelphia, filed 5-2-83

5- 4-83 √ *Record Complete for purposes of appeal*

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the original on file in my office.

ATTEST:
ALLYN Z. LITE, Clerk
United States District Court
District of New Jersey

By Laini Ann Orr
Deputy Clerk

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UNITED STATES COURT APPEALS
FOR THE THIRD CIRCUIT
DOCKET NO. 83-5261

Civil Action

RICHARD NASH,

Petitioner-Appellee,

v.

GLEN R. JEFFERS, PHILLIP S. CARCHMAN,
Mercer County Prosecutor,

Respondent-Appellant.

STATE OF NEW JERSEY]
] ss.
COUNTY OF MERCER]

AFFIDAVIT OF DEBORAH A. HANSEN

DEBORAH A. HANSEN, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am currently employed by the State of New Jersey as Chief of the Bureau of Interstate Services, within the Department of Corrections. I am responsible for the administration of the various Compacts, Agreements and Acts, including the Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.*, that pertain to the interstate

movement of fugitives and parolees. I have held this position for over four years.

2. I have been employed in the Department of Corrections for ten years. Prior to my employment as Chief of the Bureau of Interstate Services, I was employed as a supervisor within the Bureau of Interstate Services and before that as a Parole Officer in the Interstate Unit of the Bureau of Parole. When the Department of Corrections was reorganized in 1976, the Interstate Unit of the Bureau of Parole became the current Bureau of Interstate Services. My responsibilities in these positions included lodging parole violation warrants and handling all correspondence from parolees incarcerated out-of-State.

3. Whenever a New Jersey parolee is subsequently convicted of a crime and incarcerated out of State, it is the practice of the Department of Corrections to lodge a parole violation warrant detainer at the institution in which the parole violator is serving his sentence. The Department executes the warrant when the parolee is paroled or otherwise released from the out-of-State facility. An adult prison inmate is returned pursuant to the provisions of the Uniform Criminal Extradition Law, *N.J.S.A.* 2A:160-1 *et seq.*, or, where applicable, pursuant to the Uniform Act for Out-of-State Parolee Supervision, *N.J.S.A.* 2A:168-14 *et seq.*

4. The above described practice has been followed by the Department of Corrections for the 10 years I have been employed by it.

5. In support of the Department's motion to intervene I indicated that based upon the records most readily accessible at the time, it was my best estimate that the

Department had filed approximately 700 parole violation warrant detainers with other jurisdictions.

6. Since the time when the motion to intervene was filed and at the request of the Attorney General's Office, Department of Law and Public Safety, I have conducted a more thorough review of our records. While this review is not yet complete, I have been able to ascertain that of the approximately 700 warrants recorded as being filed, approximately 300 to 310 of these are parole violation warrants filed against inmates serving a term of imprisonment in another jurisdiction. The remainder of the 700 parole violation warrant detainers recorded as filed are filed against pre-trial detainees, and my understanding is that they are, therefore, not subject to the provisions of the Interstate Agreement; or warrants filed against a pre-trial detainee who is currently out on bail; or apprehension requests. In addition, all detainers lodged against parole violators serving a term of imprisonment in another jurisdiction were reviewed and, in some cases where the circumstances warranted, for example, in a case where the parole violator was subsequently sentenced to death, or sentenced to serve consecutive life terms, the Department has withdrawn its detainer. Finally, due to clerical error, some of the 700 warrant detainers recorded as being filed had in fact already been cancelled.

7. Because this review was extensive and because of limited manpower, I have been unable to compile information concerning the number of inquiries made by inmates subject to a parole violation detainer. My experience is that we routinely receive inquiries once an inmate is informed that the Department has lodged a detainer against him.

8. The cost of returning a parole violator to New Jersey varies depending upon where the parole violator is and the form of transportation used to return him to New Jersey. For example, returning a parole violator from Los Angeles may cost anywhere from approximately $1600.00, if the inmate is returned via a private security air transport firm, to $2200.00 if the inmate is returned via a commercial airline. In the former case, the fee is a package deal with the private security firm providing the personnel and the transportation from the California prison to a New Jersey airport. In the latter case, the Department must send two security guards out to Los Angeles to return the parole violator. The estimate given above, therefore, includes the round trip airfare for two employees, as well as the one-way airfare for the parole violator. Housing and meals for the security guards as well as the cost of transporting the parole violator from the prison to the airport are also included. By comparison, the cost of returning a parole violator from Graterford Prison in Pennsylvania is approximately $75.00. This figure includes gas, tolls, and meals.

9. The budget for transporting State prison inmates back to New Jersey during fiscal year 84 is $30,000. This is the total amount allocated to return not only parole violators to New Jersey, but escapees, juvenile runaways and all inmate transfers as well.

/s/ Deborah A. Hansen

Sworn and subscribed to
before me on this 20
day of September, 1983.

/s/ Catherine M. Brown

No. 84-835 (3)
No. 84-776 (2)

In The
Supreme Court of the United States
October Term, 1984

STATE OF NEW JERSEY,
Department of Corrections,
Petitioner,

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RICHARD NASH,
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PHILIP S. CARCHMAN,
Mercer County Prosecutor,
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v.

RICHARD NASH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER PHILIP S. CARCHMAN, MERCER COUNTY PROSECUTOR

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31pp

QUESTION PRESENTED FOR REVIEW

Whether the Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.* applies to a detainer based on a violation of probation or parole?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

1. Philip S. Carchman, Mercer County Prosecutor, Appellant
2. State of New Jersey, Department of Corrections, Intervenor
3. Richard Nash, Appellee

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Nash v. Carchman, 558 *F.Supp.* 641 (D.N.J. 1983).

State v. Richard Nash, 91 *N.J.* 561 (1982).

State v. Richard Nash, No. A-778-81T4, (N.J. App. Div., filed June 22, 1982).

State v. Richard Nash, No. 495-74, (N.J. Law. Div., oral opinion delivered August 25, 1981).

Richard Nash v. Glen R. Jeffes, No. 81-401, (D.N.J., filed June 24, 1981).

Richard Nash v. Glen R. Jeffes, No. 80-0246, (M.D.Pa., filed February 3, 1981).

State v. Richard Nash, No. A-2711-76, (N.J. App. Div., filed December 11, 1978).

STATEMENT OF JURISDICTION

The United States District Court had subject matter jurisdiction over the proceedings below pursuant to 28 *U.S.C.* Sec. 2254. The United States Court of Appeals for the Third Circuit had jurisdiction to review the final judgment of the District Court pursuant to 28 *U.S.C.* Sec. 1291. The Circuit Court's opinion was filed and judgment was entered on July 10, 1984. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 27, 1984. The mandate was filed on September 4, 1984. A Petition for Writ of Certiorari was filed on November 5, 1984, and granted on January

14, 1985. This Court has jurisdiction to review the Circuit Court's judgment pursuant to 28 *U.S.C.* Sec. 1254(1).

—o—

RELEVANT STATUTE

Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.*

(Reproduced in Appendix to Petition for Writ of Certiorari)

—o—

STATEMENT OF THE CASE

On January 3, 1975, a Mercer County Grand Jury returned Indictment 495-74 charging Richard Nash with Breaking and Entering With Intent to Rape, *N.J.S.A.* 2A:94-1, and Assault With Intent to Rape, *N.J.S.A.* 2A:90-2.

On June 21, 1976, defendant Nash entered a *retraxit* plea of guilty to both counts of Indictment 495-74. Pursuant to a plea agreement, the State made no recommendation as to the sentence and agreed not to request that bail be increased at the time of the plea. On October 29, 1976, defendant Nash was sentenced to an aggregate term of 36 months in the Mercer County Correction Center, 24 months suspended, and two years probation.

Defendant Nash appealed to the New Jersey Superior Court, Appellate Division, on the grounds that the sentence was manifestly excessive, unduly punitive, and an

abuse of the trial judge's discretion. On December 11, 1978, the Appellate Division denied Nash's appeal.

On June 13, 1978, while still serving the probationary portion of his New Jersey sentence, defendant Nash was arrested in Montgomery County, Pennsylvania for Burglary, Involuntary Deviate Sexual Intercourse, and Loitering. Subsequently, on June 21, 1978, the Mercer County Probation Department filed a detainer against defendant Nash charging him with a violation of probation.

On March 14, 1979, defendant Nash was convicted in Pennsylvania of Burglary, Involuntary Deviate Sexual Intercourse and Loitering. On July 13, 1979, the Pennsylvania Court sentenced the defendant to a minimum of 5 years and a maximum of 10 years to be served at the State Correctional Institution at Dallas, Pennsylvania.

On April 13, 1979, three months before he was sentenced for his Pennsylvania convictions, defendant Nash sent a letter to the Mercer County Prosecutor's Office in which he contested the validity of his Pennsylvania convictions. Defendant Nash asked for advice in the letter as to what he should do in reference to the New Jersey probation violation detainer. However, the letter makes no specific reference to the Interstate Agreement on Detainers. On May 16, 1979, the Prosecutor's Office responded by letter to defendant Nash. The letter advised him to contact his probation officer as the Prosecutor's Office had no jurisdiction over the case at this point.

On May 17, 1979, defendant Nash wrote to the Mercer County Probation Department and requested assistance

with regards to his probation violation detainer. On May 23, 1979, Probation Officer Robert Hughes responded to defendant Nash by letter. Probation Officer Hughes indicated that he had spoken with the Honorable A. Jerome Moore, J.S.C., who stated that no action could be taken on the detainer until defendant Nash was sentenced on the Pennsylvania charges. Probation Officer Hughes suggested that Nash contact the Probation Department after his Pennsylvania sentencing date.

On July 20, 1979, one week after his Pennsylvania sentencing, defendant Nash again wrote to the Mercer County Probation Department and requested that action be taken on the probation violation detainer as soon as possible. Probation Officer Judith Giordano replied by letter dated August 3, 1979, in which she stated that a hearing on the probation violation would be held as soon as an attorney from the Public Defender's Office was appointed to represent him. She further indicated that if defendant Nash did not hear from the Public Defender's Office within one week, he should write to them. When defendant Nash was not contacted by that office, he wrote again to Probation Officer Giordano with a copy of the letter sent to the Public Defender. Defendant Nash's two page letter once more contested the validity of his Pennsylvania conviction and only made reference to his New Jersey detainer in the last sentence.

Defendant Nash, by his own admission, received a Sentence Status Report from the Pennsylvania authorities on August 17, 1979. This report informed defendant Nash of his outstanding probation violation detainer and advised him of the proper procedure to dispose of his detainer under the Interstate Agreement on Detainers, *N.J.S.A.* 2A:159A-1 *et seq.* (IAD).

Defendant Nash took no action until November 5, 1979, when he sent a letter to Mr. Harold Holloway, Chief Probation Officer, requesting final disposition of the probation violation detainer pursuant to the Interstate Agreement on Detainers. On the same day, defendant Nash sent a letter to the Honorable George Y. Schoch, A.J.S.C., and enclosed a copy of his letter to Chief Probation Officer Holloway. On November 13, 1979, Judge Schoch referred defendant Nash's letters to the Mercer County Prosecutor's Office with a note suggesting that Nash was "invoking the terms of the Interstate Agreement on Detainers Act . . ."

On December 6, 1979, defendant Nash executed Form II of the Interstate Agreement on Detainers formally requesting transfer to Mercer County to dispose of the charge of violation of probation. This form was forwarded to Mercer County along with supporting documents, including Form IV of the Interstate Agreement on Detainers, and an offer by the Pennsylvania authorities to deliver temporary custody of defendant Nash to the Mercer County authorities.

On December 14, 1979, the Mercer County Prosecutor's officer responded to the request by sending Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas, Pennsylvania. This form authorized the Mercer County Sheriff's Office to take custody of defendant Nash on December 20, 1979. The Mercer County Sheriff's Officers arrived in Dallas, Pennsylvania on the appointed date but were informed for the first time that as of December 11, 1979, defendant

Nash had been temporarily moved to a penal institution at Graterford, Pennsylvania.[1]

On February 28, 1980, the Mercer County Prosecutor's Office sent another Form VI of the Interstate Agreement on Detainers to the State Correctional Institution at Dallas, defendant Nash having been returned there on February 26, 1980. The new Form VI designated March 10, 1980 as the date when the Mercer County authorities would take custody of defendant Nash.

Defendant Nash reacted by refusing to sign the additional papers required to allow the transfer to New Jersey. Rather, on March 6, 1980, Nash filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania. An amended petition was filed on December 9, 1980. Pursuant to 28 *U.S.C.* 1406, the case was transferred to the United States District Court for the District of New Jersey on February 3, 1981. (App. 101) On March 26, 1981, the Mercer County Prosecutor's Office filed an answer to defendant Nash's habeas petition.

On June 24, 1981, the Honorable Dickinson R. Debevoise, U.S.D.J., ordered the Prosecutor's Office to provide the court with specific information regarding defendant Nash's state court remedies. (App. 95) This information was provided on July 20, 1981; subsequently, on July 24, 1981, Judge Debevoise ordered that Nash's federal action be stayed until the completion of the state court proceedings available to him. (App. 81)

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[1] Given that the officers possessed a writ for defendant issued to the warden of the Dallas Prison, they had no authority to proceed to Graterford to take custody of him there.

On August 24 and 25, 1981, the Honorable Richard J.S. Barlow, Jr., J.S.C., held a hearing in which he denied defendant Nash's motion to dismiss the probation violation detainer. In addition, Judge Barlow ruled that Nash's Pennsylvania convictions constituted a violation of probation. (App. 58) On October 9, 1981, defendant Nash was resentenced on Indictment 495-74 to consecutive 18 month sentences at the Mercer County Correction Center. (App. 77)

Defendant Nash appealed to the New Jersey Superior Court, Appellate Division, on the grounds that the State failed to dispose of the probation violation detainer within the time limits imposed by the Interstate Agreement on Detainers. The Appellate Division denied the appeal (App. 44); a petition for certification to the New Jersey Supreme Court was denied on November 12, 1982. (App. 43)

Having fully exhausted his state remedies, defendant Nash's federal habeas proceeding was returned to the trial list. On January 4, 1983, Judge Debevoise held a hearing on the matter at the United States Court House in Philadelphia. The District Court had subject matter jurisdiction pursuant to 28 *U.S.C.* Sec. 2241 and 28 *U.S.C.* Sec. 2254. On March 7, 1983, Judge Debevoise issued his opinion granting defendant Nash's petition and declaring his conviction a nullity. (App. 21) *Nash v. Carchman*, 558 *F. Supp.* 641 (D.N.J. 1983). Judge Debevoise ruled that the Interstate Agreement on Detainers extends to a probation violation detainer and, furthermore, that the State violated defendant Nash's rights under the statute. An order to this effect was entered on March 21, 1983.

Philip S. Carchman, Mercer County Prosecutor, appealed to the United States Court of Appeals for the Third Circuit. The Circuit Court had jurisdiction to review an appeal from a final judgment pursuant to 28 *U.S.C.* Sec. 1291. Since the District Court framed the issue in terms of probation and parole violation detainers, 558 *F.Supp.* at 643, the State of New Jersey Department of Corrections successfully sought intervention on the basis that it has legal custody over parolees released from the New Jersey State Prison System. *See N.J.S.A.* 30:4-123.59(a). The Court of Appeals affirmed the judgment of the District Court; the Court's opinion was filed and judgment was entered on July 10, 1984. *Nash v. Jeffes,* 739 *F.*2d 878 (3rd Cir. 1984). A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 27, 1984. (App. 103) The mandate was filed on September 4, 1984. (App. 105)

Philip S. Carchman, Mercer County Prosecutor, filed a Petition for Writ of Certiorari on November 5, 1984. The State of New Jersey Department of Corrections filed a Petition for Writ of Certiorari on November 20, 1984. The Court consolidated both cases and and granted the petitions on January 14, 1985.

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SUMMARY OF ARGUMENT

The Interstate Agreement on Detainers *N.J.S.A.* 2A:159A-1 *et seq.* permits a prisoner incarcerated in one state against whom a detainer has been lodged based on an untried indictment, information or complaint

from another state, to request to be returned to such state to answer the pending charge. The issue arises as to whether detainers based on probation or parole violations are within the scope of the Act.

The plain language of the Act indicates that probation or parole violation detainers are outside the scope of the Act. The statute refers to detainers based on an "untried indictment information or complaint." In the case of a probation or parole violation detainer, there is nothing to be tried. The defendant has already been tried on the underlying charge and is before the court as part of the sentencing process.

Secondly, the purpose of the Act supplies the reason as to why its drafters limited the scope to detainers based on untried indictments, information or complaints. The statute is not designed to dispose of all detainers; indeed, many detainers are based on new convictions for which the prisoner must return to serve his sentence. The statute is designed to ensure that detainers that are lodged have a valid underlying charge. Given that detainers may have adverse effects on a prisoner's rehabilitative prospects, the Act ensures that the detainers that are lodged have a valid basis. The concern, obviously, is over detainers based on charges that have not yet been tried. On the other hand, a detainer based on a probation or parole violation is always valid per se since the new conviction conclusively establishes the violation.

Finally, while the Act is also designed to effectuate a prisoner's right to a speedy trial, this concern is directed towards detainers based on charges that have not yet been tried. The right to a speedy trial is not implicated with a

probation violation. Additionally, since the new conviction conclusively establishes the violation, there is no risk of unfair delay.

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ARGUMENT

The Interstate Agreement On Detainers Does Not Apply To Detainers Based On Violations Of Probation Or Parole.[2]

POINT ONE: The Plain Language Of The Act Excludes Detainers Based On Probation Or Parole Violations.

In response to the problem of detainers based on untried charges lodged by authorities in one jurisdiction against prisoners incarcerated in another, the Interstate Agreement on Detainers was drafted to provide for a uniform and orderly system for disposing of such detainers promptly and efficiently. The IAD is "congressionally sanctioned interstate compact the interpretation of which

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[2] It is unclear whether or not the Circuit Court's opinion applies to parole as well as probation violation detainers. Although the facts of this case involve only a probation violation detainer, the District Court framed the issue as whether the Act applied to "a charge of parole or probation violation," *Nash v. Carchman*, 558 *F.Supp.* 641, 643 (D.N.J. 1983). This was the basis for intervention by the New Jersey Department of Corrections when the case was pending before the Circuit Court. The Circuit Court affirmed the decision for the District Court; the Court did not address the distinction, if indeed there is any in this context, between probation and parole, but held that "a probation violation is covered by the Act." *Nash v. Jeffes*, 739 *F.2d* 878, 884 (3rd Cir. 1984). The New Jersey Department of Corrections nevertheless petitioned this Court for a writ of certiorari (No. 84-835). This petition was granted on January 14, 1985.

presents a question of federal law." *Cuyler v. Adams*, 449 *U.S.* 433, 442 (1982). In addition to having been enacted into federal law, the Act has also been adopted by forty-eight states and the District of Columbia.

It is provided in Article III of the IAD that:

> [w]henever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any *untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner,* he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint. . .

N.J.S.A. 2A:159A-3(a) (emphasis added).

Article III of the IAD, by its own terms, does not apply to all detainers lodged against a prisoner, rather it only applies to those detainers based on an "untried indictment, information or complaint." In *United States v. Roach*, 745 *F.2d* 1252 (9th Cir. 1984), the Ninth Circuit found the language of Article III to be clear and unambiguous:

> The words "indictment," "information," and "complaint" are terms of art with well-understood meanings in the law. They refer to documents charging an individual with having committed a criminal offense. Used in a statute, they must be accorded that meaning . . . Probation violation charges do not fall within that definition, and Congress did not express an intention to make the Agreement applicable to pro-

> bation violation charges. Therefore, the statutory language must be regarded as conclusive. . .

745 *F.2d* at 1254 (citations omitted).

Other courts which have addressed this issue have resolved it based on the plain language of Article III. In *People ex rel. Capalongo v. Howard,* 453 *N.Y.S. 2d* 45 (App. Div. 1982), the court ruled that a probation violation detainer is outside the scope of the IAD because "the violation merely results in resentencing, and does not constitute a new complaint." 453 *N.Y.S. 2d* at 47. Similarly, in *Blackwell v. State,* 546 *S.W.2d* 828 (Tenn. App. 1976), the court reasoned that:

> [t]he term "untried" refers to matters which can be brought to a full trial. In a probation revocation proceeding the trial has already been held and the defendant has been convicted. In such a hearing, the defendant comes before the court in a completely different posture than he does at his trial before conviction.

546 *S.W.2d* at 829.

Such an analysis reflects the view that a probation violation hearing or a parole revocation hearing are simply extensions of the sentencing process rather than new complaints to be "tried." The fact that Article III uses the adjective "untried" to modify the words "indictment, information or complaint" was central to the Arkansas Supreme Court's reasoning that a probation violation detainer is not covered by the IAD. In *Padilla v. Arkansas,* — *S.W.2d* — (Ark., No. CR 83-45, April 18, 1983), the court reasoned that "[a] charge against a defendant does not remain 'untried' after a defendant has pleaded guilty . . . Since appellant had entered a plea of guilty on the charges

underlying the original sentence of probation, there was nothing 'untried' within the meaning of the [IAD] . . ." slip op. at 3.

With the exception of this case, every court in the land which has addressed this issue has held that probation and parole violation detainers are not "untried indictments, informations or complaints." *United States v. Roach,* 745 *F.2d* 1252; *Hopper v. United States Parole Com'n.,* 702 *F.2d* 842 (9th Cir. 1983); *Sable v. Ohio,* 439 *F.Supp.* 905 (W.D. Okla. 1981); *Hernandez v. United States,* 527 *F. Supp.* 83 (W.D. Okla. 1972); *Cart v. DeRobertis,* 453 *N.E. 2d* 153 (Ill. App. 1983); *Padilla v. Arkansas,* — *S.W.2d* — (Ark. 1983); *Maggard v. Wainwright,* 411 *So.2d* 200 (Fla. App. 1982); *Wainwright v. Evans,* 403 *So.2d* 1123 (Fla. App. 1983); *Suggs v. Hopper,* 215 *S.E.2d* 246 (Ga. 1975); *Buchanan v. Michigan Department of Corrections,* 212 *N.W.2d* 745 (Mich. App. 1973); *People v. Batalias,* 316 *N.Y.S.2d* 245 (App. Div. 1970); *People ex rel. Capalongo v. Howard,* 453 *N.Y.S.2d* 45 (App. Div. 1982); *State v. Knowles,* 270 *N.E.2d* 133 (S.C. 1980); *Blackwell v. State,* 546 *S.W.2d* 828 (Tenn App. 1976).

By construing Article III so broadly as to include probation violation detainers within its scope, the Circuit Court has effectively substituted its judgment for the judgment of the legislatures of the States which have adopted the Act. In *People ex rel. Capalongo v. Howard,* 453 *N.Y.S.2d* 45, the court "recognize[d] that the statute commands a liberal construction . . . , but a judicially created extension to include probation violations extends the scope beyond mere liberal construction . . . Substantive changes should await legislation by the signatory States . . ." 453 *N.Y.S.2d* at 46-47.

Significantly, one state, Kentucky, has amended its version of the IAD to specifically provide for coverage of detainers based on violations of probation and parole. Kentucky Revised Statutes Section 440.455(2) provides that:

> [a]ll provisions and procedures of [the Kentucky IAD] shall be construed to apply to any and all detainers based on unheard, undisposed of, or unresolved affidavits and warrants charging violations of the terms of probation and parole.

A request to dispose of a detainer pursuant to the IAD is made under Article III. The article refers only "untried indictments, informations or complaints." The scope of the statute should be limited to the language employed by the legislature. "[A]ny extension of the coverage of the IAD is not a matter for the judiciary, but rather, falls within the province of the legislative branch, as exemplified by Kentucky's specific amendments to its law to accomplish the designed purposes." *Maggard v. Wainwright,* 411 *So.2d* at 202.

POINT TWO: The Circuit Court Erroneously Interpreted The Legislative History Of The Interstate Agreement On Detainers.

In deciding that the phrase "untried indictment, information or complaint" as used in Article III of the IAD included a violation of probation, the Circuit Court and District Court both relied heavily on the comments of the Council of State Governments which drafted the Act in 1956. Central to the District Court's reasoning, which the Circuit Court found "persuasive," was the Council's statement that:

> detainers may be placed by various authorities under varying circumstances, for example, when an escaped prisoner *or a parolee commits a new crime and is imprisoned in another state.*

Council of State Governments, Suggested State Legislation for 1957 at 74. 558 *F.Supp.* at 545 (emphasis added by District Court).

This language, coupled with the assumption that a detainer based on a probation violation will have the same adverse effects on a prisoner's rehabilitation as any other detainer, led the Circuit and District Courts to conclude that the Act was intended to apply to detainers based on probation violation detainers.

This reasoning, however, misinterprets the comments of the Council and the effect of a detainer based on a violation of probation. The commentary relied upon by the District Court is not a description of the type of detainer to which the Council expected the IAD to apply. Rather, it is a statement contained in a longer paragraph that gives a general definition of a "detainer:"

> A detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer. Wardens of institutions holding men who have detainers on them invariably recognize these warrants and notify the authorities placing them of the impending release of the prisoner. Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or a parolee commits a new series crimes in different jurisdictions.

Id. at 74.

The above paragraph aptly defines a "detainer," a definition that obviously encompasses a warrant based on a charge of violation of probation or parole. However,

Article III of the IAD does not apply to all detainers; rather, by its express terms, the IAD is limited to "any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner . . ." *N.J.S.A.* 2A:159A-3. If this commentary was meant to describe the scope of Article III, the statute itself would have simply referred to "detainers."

The Council had good reason to limit the scope of Article III. The IAD is not designed, nor can any legislation be designed, to dispose of every detainer lodged against an out-of-state prisoner. Rather, the Act addresses itself to the problem created by a misuse of the detainer system. Such misuse, whether intentional or negligent, arises from the fact that authorities do not need to make any showing whatsoever before a detainer is lodged at their request.

> Since the legal basis for a detainer is rarely examined, a prisoner can suffer loss of privileges and parole because of a charge for which there is not sufficient proof to obtain an indictment. Undoubtedly, detainers are sometimes used by prosecutors to exact punishment without having to try a charge which they feel would not result in a conviction. Once the detainer is filed by a prosecutor he has no reason to concern himself with the validity of the charge again until the detainee is released by the other jurisdiction. Subsequent discoveries or changes which destroy the basis for the detainer will likely be communicated to the incarcerating authorities only by the most conscientious prosecutors.

Note, *Detainers and the Correctional Process,* 4 Wash. U.L.Q. 417, 423 (1966).

Given the adverse consequences that a detainer will have upon a prisoner's rehabilitative prospects, it is obviously desirable to ensure that such detainers are based upon a valid charge. The Council of State Governments took note of the "statement of aims of guiding principles" promulgated by a group known as the Joint Committee on Detainers which included the statement that "No prisoner should be penalized because of a detainer pending against him unless a thorough investigation of the detainer has been made *and it has been found valid.*" Council of State Governments, *supra,* at 75 (emphasis added). Most significantly, Article I of the IAD states that "it is the policy of the party states and the purpose of this agreement to encourage the expiditious and orderly disposition of . . . charges and *determination of the proper status* of any and all detainers based on untried indictments, informations or complaints . . ." *N.J.S.A.* 2A:159A-1 (emphasis added). Indeed, even the court below noted the comments of one writer who indicated that:

> The thrust of [the IAD] is not to protect the convict's right to a speedy trial per se, but rather to protect him from the particular disabilities engendered by an untried detainer pending against him while he is serving a prison term. Often the effect of such a detainer, *which could be based upon an unsubstantiated charge,* is to aggravate the punishment received for the original offense.

Note, *The Right to a Speedy Trial and the New Detainer Statutes,* 18 Rutgers L.Rev. 828, 832 (1964) (footnote omitted and emphasis added), quoted at 739 *F.2d* at 882.[3]

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[3] In discussing the proposed companion legislation regarding disposing of detainers within the state (Intrastate Detainer Statute), the Council of State Governments noted that this stat-

(Continued on following page)

If a prisoner has an out-of-state detainer based upon an untried indictment, information or complaint lodged against him, he may invoke his rights under the IAD to have the underlying indictment, information or complaint adjudicated. This will result in either a new conviction, an acquittal, or a decision by the State not to prosecute. If the trial results in a conviction, then the prisoner is returned to the State in which he is serving his original sentence *with a detainer still lodged against him.* The difference, of course, is that the new detainer is based upon the new conviction, not upon an untried indictment, information or complaint. The IAD will have served its purpose; the prisoner—and the correction officials—now know that the detainer has a valid basis. Furthermore, the prisoner whose trial results in an acquittal or a decision by the State not to prosecute, will be returned to the State in which he is serving his sentence without the detainer lodged against him. Again, the IAD will have served its purpose; the prisoner will not suffer the adverse consequences engendered by a detainer based upon an invalid charge. Thus, it is clear that the IAD is not designed to dispose of all detainers; rather, given that detainers based upon untried indictments, informations or complaints "*produce uncertainties* which obstruct programs of prisoner treatment and rehabilitation," *N.J.S.A.* 2A:159A-1, (emphasis added), the IAD seeks to ensure that a detainer lodged against a prisoner is based upon a valid charge.

(Continued from previous page)

ute gives a prisoner "no greater opportunity to escape just convictions, but *it does provide a way for him to test the substantiality of detainers placed against him* and to secure final judgment on any indictments, informations or complaints outstanding against him in the state." Council of State Governments, *supra,* at 76-77 (emphasis added).

The concern over the validity of the charge underlying a detainer is directed towards those detainers in which the underlying charge has not yet been tried. Thus, the IAD is applicable to those detainers based upon "untried indictments, informations or complaints." Conversely, there is no such concern when the detainer is based upon a violation of probation. A probation violation is conclusively established when the probationer is convicted of subsequent crimes. *State v. Zachowski,* 53 *N.J. Super.* 431, 441-42 (App. Div. 1959). In the present case, given his Pennsylvania convictions, respondent Nash could hardly have been uncertain as to his probationary status. His new conviction conclusively established the violation of his New Jersey probation. Thus, the detainer lodged against him was based on a valid charge. If Nash had been returned to New Jersey immediately to resolve the probation violation, he would have been returned to Pennsylvania after being re-sentenced *with a detainer still lodged against him.* Even if the New Jersey sentence was imposed concurrently with his Pennsylvania sentence, Nash would still have been returned to Pennsylvania with a detainer lodged against him to ensure service of his New Jersey sentence. As a practical matter, Nash's detainer would still be lodged against him whether he could make use of the IAD or not. The IAD is of no use to prisoners faced with a detainer based on a probation violation. Such detainers are always valid since the violation is conclusively established by the new conviction. On the other hand, the IAD is of great value to prisoners facing untried charges. By adjudicating the underlying charge, a prisoner can escape the burdens caused by a detainer based upon an invalid charge. Thus, Article III limits the scope of the Act to those detainers based upon "untried indictments, informations or complaints."

The Circuit Court felt that in a "significant number" of cases, the probation violation charge lodged against the prisoner incarcerated out-of-state would be based not on the new conviction, but rather upon technical, non-criminal violations of the prisoner's probation agreement. 739 *F.2d* at 882 n.7. However, the Act only may be invoked by a person who "has entered upon a term of imprisonment in a penal or correctional institution of a party State . . ." *N.J.S.A.* 2A:159A-3(a). Thus, if a defendant is incarcerated in another state, the probation or parole violation detainer will always be based on the new conviction in that state, rather than on any technical violation of the terms of probation. While there may in fact be other technical violations, in the context of the IAD there will always be a violation based upon the new conviction.

The limiting language of Article III demonstrates that the drafters of the IAD were aware of the qualitative differences between detainers based on "untried indictments, informations or complaints" and those based on violation of probation or parole. The former raise legitimate concerns over final adjudication of guilt or innocence and uncertainties concerning a prisoner's release date both of which will interfere with the rehabilitative process. No such problems are raised by the latter.

POINT THREE: While The Interstate Agreement On Detainers Is Designed To Preserve A Prisoner's Speedy Trial Rights, A Right To A Speedy Trial Is Not Implicated With A Probation Or Parole Violation.

Besides being a mechanism whereby the uncertainty over the validity of a detainer can be alleviated, the IAD

is also designed to effectuate a prisoner's Sixth Amendment right to a speedy trial. Indeed, in *Smith v. Hooey,* 393 *U.S.* 374 (1969), the Court held that an inmate incarcerated out-of-state who has an untried charge pending in another State has a constitutional right to a speedy disposition of that charge.

The IAD itself clearly states that it is the finding of the party States that many of the uncertainties that obstruct prisoner rehabilitation are caused by "difficulties in securing speedy trial of persons already incarcerated in other jurisdictions." *N.J.S.A.* 2A:159A-1. The congressional legislative history surrounding the IAD's enactment into federal law is also illuminating.[4] Senator Hruska sponsored the bill on the Senate floor and declared:

> At the heart of this measure is the proposition that a person should be entitled to have criminal charges pending against him determined in expeditious fashion—another manner of stating the speedy trial guarantees of the Constitution.

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[4] In *Cuyler v. Adams,* 449 *U.S.* 433, the Court was presented with the question of whether a state prisoner transferred involuntarily under article IV of the IAD had a right to a pre-transfer hearing. The case involved the transfer of a Pennsylvania state prison inmate to New Jersey to answer state criminal charges. In answering the question in the affirmative, the Court looked to the plain language of the Act, the legislative history generated by the Council of State Governments, and the federal legislative history surrounding Congress' enactment of the IAD in 1971. Given that the IAD is a federal law, the federal legislative history is likewise instructive on the issue of whether the IAD applies to probation or parole violation detainers.

116 *Cong. Rec.* 38840. The Senate Committee considering the legislation likewise stated:

> The committee is of the opinion that the enactment of this legislation would afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right.

Id. at 38841.

In *Hopper v. United States Parole Com'n,* 702 *F.2d* 842 (9th Cir. 1983), the court dealt with a situation in which the Parole Commission lodged a detainer against a California prisoner for violation of parole. In March 1981, the prisoner requested a transfer to federal custody for a parole revocation hearing. When the hearing had not taken place by December 1981, the prisoner filed a habeas corpus petition alleging, *inter alia,* that the parole revocation charge must be dismissed due to a lack of a timely hearing as required by the IAD. The Ninth Circuit rejected this argument and held "that an unadjudicated parole violator warrant is not a 'complaint' within the meaning of article III. . . ." 702 *F.2d* at 845.

The Court's analysis in *Hopper* focused on the Congressional legislative history. Congress referred to prisoners "convicted on the new charges," 1970 *U.S. Code Cong. & Ad. News* 4865 the "threat of another prosecution," 116 *Cong. Rec.* 38840, and a "request [for] trial." *Id.* at 38841. Additionally, the legislative history made it clear that "Congress was in part addressing their concern with recent Supreme Court cases vacating state charges, where the state had failed to bring a defendant to trial for a number of years while the defendant was serving time in a federal penitentiary." 702 *F.2d* at 846.

This concern for a prisoner's speedy trial rights is logically consistent with the limiting language of Article III. In the case of a probation or parole violation detainer, the speedy trial rights of the prisoner are not implicated. The Circuit Court observed that "[a]lthough there is no constitutional right to a speedy adjudication in probation violation cases, we believe that concern for a fair adjudication, as well as concern for constitutional rights, should inform our interpretation of the IAD." *Nash v. Jeffes,* 739 *F.2d* at 882, n.7.[5] This concern, however, was raised in the context of the probation violation based on a "non-criminal act which is prohibited by the terms of probation" where "the prisoner's opportunity for a fair adjudication may be compromised by delay." *Id.* As discussed earlier, the IAD only becomes relevant when a person is serving a term of imprisonment in another state. Thus, the probation violation in this context will never be based on a non-criminal act; rather, the violation will always be based on the new conviction which results in the out-of-state term of imprisonment Since this conviction conclusively establishes the probation violation, the delay will not pose any risk to the prisoner's fair adjudication of the charge.

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[5] In *Moody v. Daggett,* 429 *U.S.* 78 (1976), the court held that a prisoner serving a sentence for a crime he committed while on parole has no constitutional right to have a parole violation warrant executed promptly when he is serving the sentence for the same sovereign. The court left open the question of a parole violation serving his intervening sentence in another jurisdiction.

CONCLUSION

For the foregoing reasons, the State respectfully submits that a detainer based on a violation of probation or parole is not within the scope of the IAD, and asks that the decision of the Circuit Court be reversed.

PHILIP S. CARCHMAN
Mercer County Prosecutor

(5) (4)

Nos. 84-835 and 84-776

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,
Petitioner

v.

RICHARD NASH,
Respondent

PHILIP CARCHMAN,
Petitioner

v.

RICHARD NASH,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMICI CURIAE STATES OF PENNSYLVANIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MASSACHUSETTS, MINNESOTA, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING SUPPORTING REVERSAL

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QUESTION PRESENTED FOR REVIEW

WHETHER ARTICLE III OF THE INTERSTATE AGREEMENT ON DETAINERS APPLIES TO A DETAINER BASED UPON A CHARGE OF VIOLATION OF A PROBATIONARY SENTENCE, WHICH SENTENCE WAS ENTERED AFTER CONVICTION, BY INTERPRETING THE PHRASE "UNTRIED INDICTMENT, INFORMATION OR COMPLAINT" TO ENCOMPASS SUCH A DETAINER?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-835
STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,

Petitioner

Against

RICHARD NASH,

Respondent

and No. 84-776

PHILIP CARCHMAN,

Petitioner

Against

RICHARD NASH,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE AMICI CURIAE STATES OF PENNSYLVANIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MASSACHUSETTS, MINNESOTA, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING

SUPPORTING REVERSAL

INTEREST OF AMICI STATES

This case presents the question of whether a prisoner's right to speedy disposition of certain detainers guaranteed by the Interstate Agreement on Detainers (Agreement) extends to a detainer based on a charge of violation of a probationary sentence.[1] Article III(a) of the Agreement obligates a prosecutor to arrange the return an out-of-state prisoner for trial within 180 days of the prisoner's delivery of a written request for final disposition of "any untried indictment, information or complaint." (18 U.S.C. App. (1976)).

[1]Previously in an action brought pursuant to the Civil Rights Act, 42 U.S.C. §§1981, 1983 (1976) the Court has found that the Agreement is a uniform compact approved by Congress and as such its construction presents a federal question. Cuyler v. Adams, 449 U.S. 433, 438 (1981).

Article V(c) provides that failure to accept temporary custody or failure to bring the prisoner to trial within the time provided obligates the court in which the charges are pending to dismiss the untried charges with prejudice and to order that any detainer based on the charges have no effect.

The Court of Appeals held that the Agreement was applicable to a detainer based on a charge of violation of a probationary sentence where the probationary sentence was imposed after conviction.[2] Based on this interpretation, the Court of Appeals affirmed the district court's order granting a

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[2]In the instant case Nash, pursuant to a plea bargain, pled guilty to the crimes of breaking and entering with intent to rape and assault with intent to rape. He received a sentence of 36 months, 24 months suspended with two years probation. Pet. App 77, 78, 102.

writ of habeas corpus.[3] Amici States, all signatories to the Agreement, submit that the Third Circuit's opinion creates a new and substantial administrative and fiscal burden on their limited personnel

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[3]This Court, while finding the Agreement presented a federal question under 42 U.S.C. §§1981, 1983 (1983), Adams, supra., has never addressed whether the Agreement presents a federal question when the jurisdiction of the federal courts is being invoked pursuant to the Habeas Corpus statutes, 28 U.S.C. §§ 2241, 2254, 2255, (1976)). While the various courts of appeals which have addressed the availability of federal collateral review for violations of the Agreement post-Adams are in accord that the Agreement is one of the "laws...of the United States" contemplated by 28 U.S.C. §§2241, there is a split of opinion as to whether failure to provide the process set forth in the Agreement is an "error of law [and is] 'a fundamental defect which inherently results in a complete miscarriage of justice'", Davis v. United States, 417 U.S. 333, 346 (1974). Compare: Cavallaro v. Wyrick, 701 F.2d 1273, 1275 (8th Cir.) cert. denied, ___ U.S. ___, 51 L.W. 3902

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and financial resources without providing the salutory effect perceived to exist by the Court of Appeals and that the decision of the Third Circuit runs counter to the plain meaning of the language of the statute and to the available legislative

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FOOTNOTE CONTINUED

(June 20, 1983); Johnson v. Williams, 666 F.2d 842, 844 n. 1 (3d Cir. 1981); Cody v. Morris, 623 F.2d 101, 103 (9th Cir. 1980), Bush v. Muncy, 659 F.2d 402, 409 (4th Cir. 1981), cert denied, 455 U.S. 910 (1982); Edwards v. United States, 564 F.2d 652, 653 (2d Cir. 1977); Fasano v. Hall, 615 F.2d 555, 558 (1st Cir.) cert. denied, 449 U.S. 867 (1980), Neville v. Cavanagh, 611 F.2d 673, 676 (7th Cir. 1979) (dictum) cert. denied 446 U.S. 908 (1980), Rivera v. Harris, 643 F.2d 86, 90 n. 2 (2nd Cir.) rev'd on other grounds, 454 U.S. 339 (1981); and United States v. Williams, 615 F.2d 585, 590 (3d Cir. 1980).

history.[4] Accordingly, amici have a substantial interest in the outcome of this case.

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[4]No exact tally of the number of prisoners confined under sentence in one signatory state with detainers lodged by another signatory state for violation of either a probationary sentence or the conditions of parole was available as none of the states routinely tabulates such information. However, the National Crimes Information Center of the United States Department of Justice informs us that as of February 5, 1985, 15,598 persons were listed as being sought by the 48 signatory states and the District of Columbia for violation of parole and 27,177 persons were listed as being sought by the same jurisdictions for violation of probationary sentences. Amici believe a significant number of this total will ultimately be located through arrest for new crimes committed in another signatory jurisdiction and those new charges will result in conviction and sentencing.

Summary of Argument

It was the unfulfilled responsibility of the court below to construe the Agreement consistent with the plain meaning of the statute aided by whatever clearly expressed legislative intent was found to exist. To the contrary, the Third Circuit assumed a policy making role and in so doing oversimplified the nature of the policy interests at stake.

Amici submit that the language of the statute, the available legislative history and its purpose read in conjunction do not reveal a clearly expressed intent contrary to the traditional definitions of "untried indictment, information or complaint". There is no constitutional obligation to quickly resolve these detainers. For such an obligation to exist the States must be found to have freely and knowingly agreed to it. The conclusion of each State court which has ruled on the issue that detainers for

violations of a probationary sentence are outside the scope of the Agreement rebuts any assumption to the contrary. The interpretation by the courts below that the scope of the Agreement is controlled by a general definition of the word detainers renders the critical limiting phrase surplusage. Such an interpretation is contrary to the rules for proper statutory construction.

Lastly, the Court of Appeals failed to weigh all policy considerations and premised its analysis on misassumptions of fact. Given the predictive nature of the hearing, amici believe that an early resolution of the detainer when the violator has had no time to exhibit reformed behavior will militate both in favor of revocation and the longest sentence permitted. To force such action serves neither the interests of society nor the prisoner.

ARGUMENT

A DETAINER FOR A CHARGE OF VIOLATION OF A PROBATIONARY SENTENCE IS NOT A DETAINER FOR AN "UNTRIED INDICTMENT, INFORMATION OR COMPLAINT" AND THE AGREEMENT ON DETAINERS IS NOT APPLICABLE TO SUCH A DETAINER.

In its decision in this case the Third Circuit has abandoned its role as interpreter of statutes in favor of the policy-making role usually thought to reside in the legislatures of the States and Congress. The Court, frankly and with little hesitation, rejected the "technical" construction of the Agreement arrived at by the Ninth Circuit and each of the state courts which have addressed the question.[5] In so doing, the Court

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[5]Four state courts of last resort have determined that the Agreement is inapplicable to a detainer for violation of a probationary sentence: Clipper v. Maryland, 295 Md. 303, 455 A.2d 973 (1983); Padilla v. Arkansas, 279 Ark. 100, 648 S.W.2d 797 (1983); State v.

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of Appeals not only overstepped the proper bounds of its function in resolving disputes - it also oversimplified the nature of the policy interests at stake. Because the decision below failed to properly heed the limits of the precise statutory language under review, it must be reversed.

Amici submit that, in determining the intended scope of the Agreement the Court of Appeals should have looked first

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FOOTNOTE CONTINUED

Knowles, 275 S.C. 312, 270 S.E. 2d 133 (1980), and Suggs v. Hopper, 234 Ga. 242, 215 S.E. 2d 246 (1975). In addition, three state intermediate courts have held likewise: People ex rel. Capalongo v. Howard, 87 App. Div. 2d 242, 453 N.Y.S. 2d 45 (N.Y. App. Div. 1982); People v. Jackson, 626 P.2d 723 (Colo. App. 1981); and Blackwell v. State, 546 S.W. 2d 828 (Tenn. Crim. App. 1976).

at its language.[6] Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110 (1985). "[W]hen aid to construction of the meaning of words, as used in statute, is available there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'".

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[6]The relevant portion of Article III of the Agreement provides:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint....

18 U.S.C. App. (1976).

Cass v. United States, 417 U.S. 72, 78-79 (1974) quoting United States v. American Trucking Assns., Inc., 310 U.S. 534, 543-544, reh. denied, 311 U.S. 724 (1940). But "[i]f the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is 'a clearly expressed legislative intent to the contrary.' [United States v. Turkette, 452 U.S. 576, 580 (1981)], quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)" Dickerson 460 U.S., at 110. The task before the Court of Appeals was "to interpret the words of [the statute] in light of the purposes [the State legislatures and] Congress sought to serve." Ibid, quoting Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979).

Here the Court of Appeals appears to have concluded implicitly that the

language of the Agreement, when compared with the purposes of the Agreement and the scant available history, rendered the language sufficiently ambiguous to reject the traditional, or as termed by the circuit court "technical", meaning of the phrase "untried indictment, information, or complaint" found throughout the Agreement in favor of an expanded definition to include charges of violation of probationary sentences.[7] The language of the statute, its legislative history and its purpose read in conjunction do not reveal a clearly expressed

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[7]The commentary relied upon was published in 1956 by the Council of State Governments and included in their publication of "Suggested State Legislative Program for 1957", pp 74-76 (1956). United States v. Mauro, 436 U.S. 340, 359 (1978). It should be noted that the type of probation involved is important to the position of amici. Their position does not relate to periods of probation imposed without verdict as part of a

FOOTNOTE CONTINUED ON NEXT PAGE

legislative intent contrary to the traditional definition found appropriate by the Court of Appeals for the Ninth Circuit in United States v. Roach, 745 F.2d 1252 (9th Cir. 1984)(probation detainer) and Hopper v. United States Parole Commission, 702 F.2d 842 (9th Cir. 1983) (parole violation).

Article I of the Agreement states the purpose of its enactment: "[I]t is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition

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FOOTNOTE CONTINUED

prosecution diversion program. In such situations the accused foregoes his right to a speedy trial in consideration for the prosecutor's promise to nolle pros the charges after the accused has satisfactorily completed a period of supervision. If the accused violates the terms of such supervision the prosecutor reinstates the untried charge and the matter proceeds as if the hiatus had not occurred.

of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints." (18 U.S.C. App.) But whatever may be the breadth of the term "charges", Article III imposes obligations on the signatory parties only with respect to an "untried indictment, information or complaint." What these terms have in common is that they denote the initiation of criminal proceedings. Of course, proceedings connected with probation, including those in which alleged violations of probationary conditions are reviewed, are but a continuation of the process which began with an untried criminal accusation and resulted in a probationary sentence after conviction. It takes a rather imaginative leap in reasoning to conclude that the terms indictment, information or complaint were intended by the signatories to refer

to a state's claim that a prisoner has violated the conditions for release from a sentence imposed after trial on an indictment, information or complaint.

The Court of Appeals, by expanding the scope of Articles III and V of the Agreement to include detainers for violation of probationary sentences, has created a substantial obligation on the States. Since there is no constitutional obligation on the States to move speedily to revoke probation, Moody v. Daggett, 429 U.S. 78 (1976),[8] the States' obligations are those knowingly accepted by the States in signing the

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[8]The Third Circuit has considered and rejected the argument that a different conclusion is warranted in the situation in which two different and autonomous parole authorities are involved. United States ex rel Caruso v. United States Board of Parole, 570 F.2d 1150, 1155 (3d Cir.), cert. denied, 436 U.S. 911 (1978).

Agreement. As such, the Agreement is a contract and the question is what terms each State voluntarily and knowingly accepted to enter the Agreement.[9] As observed by this Court in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981): "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." The States' obligations must be "unambiguous" Ibid. In this regard, it is highly illuminating in answering the question of to what did the States agree that no State court has held that the Agreement includes within its scope detainers for violation of probationary

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[9]Indeed, the preample of the Agreement concludes: "The contracting states solemnly agree that...." (18 U.S.C. App. (1976))."....

sentences.[10]

The available legislative history supports our position. The legislative history from the Congress, created when the United States adopted the Agreement, explains that "[a] detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." H.Rep.No. 91-1018, p. 2 (1970); S. Rep. No. 91-1356, p. 2. (1970), reprinted in 1970 United States Code, Congressional and Administrative News 4864. Of course, allegations that the conditions of probation have been violated are not criminal charges. That same legislative history notes further that "the enactment of this legislation would

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[10]See: Note 5, supra.

afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right." Ibid. This legislative history, which does not mention detainers for charges of violation of probationary sentences, reveals a concern which only could relate to new criminal charges; there is no constitutional "speedy trial right" to disposition of such violation detainers. See, e.g., Moody, supra.[11]

The commentary relied upon by the district court and the Court of Appeals (Pet. App. 10, 28) in turn merely suggests in general terms the

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[11]In Moody the Court did not have before it the question of whether the potential of adverse actions by two different and antonomous parole authorities warranted a different conclusion and expressly reserved determination of this question. 429 U.S., at 88.

various possible sources of detainers and is not an attempt to define precisely the scope of the Agreement. If indeed the Agreement was to encompass every conceivable type of detainer, the inevitable conclusion is that the qualifying phrase "any untried indictment, information, or complaint" is surplusage. An interpretation which renders a portion of a statute plainly redundant should be avoided. Bell v. New Jersey, 461 U.S. 773, 788-789 (1983). Therefore, amici submit that neither the language of the Agreement nor the available legislative history supports the conclusion that probation parole violation detainers are within its scope.[12]

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[12]One State, Kentucky, has amended the language of the Agreement to specifically include detainers for violations of probation and parole. Kentucky

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Furthermore, the Court of Appeals failed to consider all of the relevant policy considerations when it concluded

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FOOTNOTE CONTINUED

Revised Statutes, Section 440.455 Enact. Acts 1976, Ch. 211 §1. That amendment provides:

> Interstate agreement to apply to detainers based on affidavits and warrants charging violation or probation and parole--Commonwealth of Kentucky is a party to the interstate agreement on detainers and shall be deemed to have contracted with each state joining therein an amendment to said interstate agreement in the form substantially as follows:
>
> Amendment to the interstate agreement on detainers concerning detainers based on violations of the terms of probation and parole (1) This amendment shall provide additional remedies, and shall be binding only as among and between those party states which specifically execute the same. (2) All provisions and procedures of KRS 440.450 shall be construed to apply to any and all detainers based on unheard, undisposed of, or resolved affidavits and warrants charging violations of the terms of probation and parole.

As no other State has enacted such an amendment, its provisions have never become effective.

that an early hearing on a parole violation charge necessarily benefits the prisoner. To the contrary it can be assumed safely that a probationer who has been convicted of an offense resulting in new incarceration will have his probation revoked.[13] There is no reason to believe that replacing a detainer for potential violation with a detainer for a found violation will benefit the prisoner during his current imprisonment. The sentence imposed frequently will be for a range of time rather than a specific determinate time period so that certainty as to the specific date of release is not materially advanced. It is also likely that given the unknowns of possible future future good behavior

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[13]The new conviction alone is conclusive on the question of whether a violation has occurred. Morrissey v. Brewer, 408 U.S. 471, 490 (1972).

by the violator and the fact that the most recent factor to be considered is the new conviction, the period imposed will be the longest sentence permitted. As explained in Moody, in the context of a parole revocation hearing:

> Finally, there is a practical aspect to consider, for in cases such as this, in which the parolee admits or has been convicted of an offense plainly constituting a parole violation, the only remaining inquiry is whether continued release is justified notwithstanding the violation. This is uniquely a "prediction as to the ability of the individual to live in society without committing antisocial acts." In making this prophecy, a parolee's institutional record can be perhaps one of the most significant factors. Forcing decision immediately after imprisonment would not only deprive the parole authority of this vital information, but since the other most salient factor would be the parolee's recent convictions...a decision to revoke parole would often be foreordained. Given the predictive nature of the hearing, it is appropriate that such hearing be held at the time at which prediction is both most relevant and most accurate--at the expiration of the parolee's intervening sentence.

429 U.S., at 89.

The statutory construction which the Court of Appeals candidly admits is an "analysis of the legislative history ...based on policy...," Pet. App. 13, n. 9, is neither interpretation of the statutory language as controlled by a clearly expressed legislative intent nor a proper historical analysis of the problem sought to be remedied by the Agreement. To "expand[] the scope", Ibid., of the Agreement is a legislative function not a judicial one and the Court of Appeals lacked the authority to do so. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 31 (1973).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Nos. 84-835, 84-776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

RICHARD NASH,
Respondent.

and

PHILIP S. CARCHMAN,
MERCER COUNTY PROSECUTOR,
Petitioner,

v.

RICHARD NASH,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED

Did the Court of Appeals correctly hold that Article III of the Interstate Agreement on Detainers, as evidenced by the language of the Agreement and its explicit legislative history, applies to detainers based upon probation violation complaints?

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STATEMENT OF THE CASE

On June 21, 1978, the Mercer County Probation Department of the State of New Jersey filed a detainer against the respondent Richard Nash who was then incarcerated in Pennsylvania upon various charges. The detainer charged that the respondent had violated the conditions of his probation by having been charged with a crime in Pennsylvania while on probation from New Jersey. After respondent began service of his Pennsylvania sentence, he perfected his request for a final disposition of the detainer under the Interstate Agreement on Detainers (hereinafter Agreement). *N.J. Stat. Ann.* § 2A:159A-1 *et. seq.* (West 1971)[1] While acknowledging the applicability of the Agreement to respondent's probation violation complaint, the Mercer County Prosecutor failed to return respondent to New Jersey for a final disposition of the detainer within the statutorily prescribed time period.[2]

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[1] The Detainer Agreement is reproduced in the Appendix at App. 110-124 filed simultaneously and bound with the Petition for Certiorari submitted by petitioner, Philip S. Carchman and incorporated by reference in the Joint Appendix. References to "App." are to pages of this Appendix.

[2] At the time the detainer was filed against the respondent, he was arrested and imprisoned in Pennsylvania pending trial. He was tried and convicted on the Pennsylvania charges on March 14, 1979, and sentenced on July 13, 1979. During the period from February, 1979 until November 5, 1979, the respondent sent one or more letters to officials in Mercer County, including New Jersey Judge A. Jerome Moore, Mercer County Prosecutor Anne Thompson, Mercer County Probation Officer Judy Giordano, Chief Mercer County Probation Officer Holloway and Mercer County Assignment Judge George Y. Schoch, requesting final disposition of the detainer. On December 6, 1979 the respondent executed Form II under the Interstate Agreement on Detainers formally requesting transfer to Mercer County to resolve the probation violation charge. Although his letters made no

Accordingly, on March 6, 1980, the respondent, pursuant to 28 U.S.C. § 2254 (1976), filed a petition for a writ of *habeas corpus* in the United States District Court for the Middle District of Pennsylvania seeking dismissal of the detainer in accordance with his rights under Article III(d) of the Agreement. (App. 97-100) On February 3, 1981, the District Court for the Middle District of Pennsylvania, for jurisdictional reasons, transferred the case to the United States District Court for the District of New Jersey and entered an order to that effect. (App. 101). On July 24, 1981, the Honorable Dickinson R. Debevoise, U.S.D.J., entered an order staying respondent's federal action until exhaustion of state court remedies within New Jersey. (App. 81).

On August 24 and 25, 1981, the New Jersey trial court held a hearing on respondent's motion to dismiss the probation violation detainer. Assuming that the Detainer Agreement was applicable to probation violation detainers, and never addressing the issue, the court denied respondent's motion on the ground that he had not substantially complied with the statutory notice requirements. (App. 51-75) In addition, the court ruled respondent's Pennsylvania convictions constituted a violation of probation and resentenced him to consecutive 18 month sentences to be served at the Mercer County Detention Center consecutive to service of his Pennsylvania sentence. (App. 80) On June 22, 1981, the Appellate Division of the Superior Court of New Jersey affirmed the judgment of conviction for the reasons relied upon by the lower court (App. 44); on November 12, 1981, the New Jersey Supreme Court denied a petition for certification. (App. 43)

explicit reference to the Agreement, both lower courts found that his communications effectively notified the Mercer County Prosecutor and court of his demand for final disposition of the detainer under the Agreement and that the State of New Jersey failed to fulfill its obligation to provide a resolution of the complaint within 180 days from when he made his request. *Nash* v. *Jeffes*, 739 F. 2d 878, 885 (3d Cir. 1984) (App. 1-18); *Nash* v. *Carchman*, 558 F. Supp. 641, 651 (D.N.J. 1983) (App. 21-42).

On January 4, 1983, Judge Debevoise held a hearing at the United States Court House at Philadelphia to decide the legality of the detainer. The District Court ruled that Article III of the Agreement is applicable to detainers based upon probation violation complaints and that the State of New Jersey had violated the respondent's rights to a prompt hearing under the Agreement by failing to provide a resolution of the detainer within the required statutory time period. *Nash* v. *Carchman*, 558 F. Supp. 641 (D.N.J. 1983) (App. 21-42). On March 21, 1983, Judge Debevoise vacated the respondent's conviction of a violation of probation and ordered his release from state custody. (App. 42-43)

Petitioner Mercer County Prosecutor appealed to the United States Court of Appeals for the Third Circuit. Petitioner Department of Corrections of the State of New Jersey was allowed to intervene on the ground that the District Court's decision invalidated its policy that parole and probation violation detainers do not fall within Article III of the Agreement. (App. 18) In a carefully considered opinion, the Court of Appeals held that, as a matter of statutory construction, Article III(a) of the Detainer Agreement encompasses probation violation detainers within its scope. *Nash* v. *Jeffes*, 739 F. 2d 878 (3d Cir. 1984) (App. 1-18)[3]. This ruling was based on the

[3] A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 27, 1984 (App. 103). The mandate was filed on September 4, 1984. (App. 105)

language of the Detainer Agreement and the Council of State Government's legislative commentary. The court concluded "[f]airness to the prisoner and proper allocation of society's resources require that detainers be promptly removed unless the prisoner has been finally and constitutionally sentenced to further imprisonment on the basis of the charge underlying the detainer. This is true regardless of whether the detainer is based on an indictment or on a probation violation." *Id.* at 883 (App. 12).

SUMMARY OF ARGUMENT

This case presents the question of whether a probation violation detainer is an "untried complaint" within the meaning of the phrase "untried indictment, information or complaint" as used in Article III of the Interstate Agreement on Detainers. Article III gives a prisoner the right to demand a final disposition of any detainer based upon an "untried indictment, information or complaint" in the foreign jurisdiction from which the detainer emanates. Article I of the Agreement explicitly provides that the act is addressed to all "charges outstanding against a prisoner," and Article IX mandates that the Agreement "shall be liberally construed so as to effectuate its purposes." Principles of statutory construction dictate that these three articles should be construed together. A joint construction of these three articles logically leads to the conclusion that a probation violation detainer is an "untried complaint" within the intendment of the phrase "untried indictment, information or complaint" as used in Article III. Other provisions of the statute compel the same conclusion.

Legislative history contemporaneous with the Agreement provides further strong support for interpreting the Agreement as enhancing prisoner's rights and applying

Article III to detainers based upon probation violation complaints. The major purpose of the Agreement was to benefit prisoners principally by minimizing the disruptive effect upon rehabilitation caused by the policy of allowing detainers to remain unresolved against a prisoner for an indefinite period of time. Because the effects of a probation violation detainer upon prisoners and programs of treatment do not differ from the effects caused by detainers based upon other charges, it is therefore absolutely consistent with the desires of the legislature to construe the Agreement as incorporating probation violation complaints and affording to prisoners the redress provided by Article III.

Furthermore, because the operative provisions of the Agreement can be so readily applied to dispose of detainers based upon probation violations, applying Article III to probation violation detainers would not impose any significant administrative or financial burdens upon the State. Actually, such application would promote the efficient administration of justice and reduce the expenses incurred in the handling of detainers. Even if application of Article III to probation violation detainers were to result in an increase of governmental burdens, any interest the State has in reducing costs is outweighed by the prisoner's interest in rehabilitation.

The Third Circuit Court of Appeals correctly construed that the phrase "untried indictment, information or complaint" as used in Article III includes probation violation detainers within its scope. The decision of the Court achieves the goals enunciated in the policy statement and legislative history of the Agreement and avoids a literal interpretation of the operative phrase that would defeat the statutory scheme.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY HELD THAT A PROBATION VIOLATION COMPLAINT IS INCLUDED WITHIN THE MEANING OF THE PHRASE "UNTRIED INDICTMENT, INFORMATION OR COMPLAINT" AS USED WITHIN ARTICLE III OF THE INTERSTATE AGREEMENT ON DETAINERS.

A. The Language Of The Agreement Clearly Indicates That The Drafters Intended The Agreement To Apply To Detainers Based On Probation Violation Complaints.

The Interstate Agreement on Detainers is an interstate compact enacted by forty-eight states, the federal government and the District of Columbia to facilitate interstate resolution of detainers based upon all charges outstanding against prisoners. *Cuyler* v. *Adams*, 449 U.S. 433, 422 (1981).[4] Article III confers upon a prisoner against whom a detainer has been lodged the right to demand that the prosecuting authorities in the receiving state bring him to trial within 180 days of his written request. *N.J. Stat. Ann.* § 2A:159A-3(a). Such a written request constitutes a request for final disposition of all untried charges underlying detainers filed by the receiving state. *N.J. Stat. Ann.* § 2A:159A-3(d). The request is

[4] The final draft of the proposed legislation was circulated by the Council of State Governments in 1957. Council of State Governments, *Suggested State Legislation, Program for 1957*, 80 (1956). The New Jersey Interstate Agreement on Detainers was enacted verbatim shortly thereafter in 1959. *N.J. Stat. Ann.* § 2A:159A-1 *et seq.* In 1970, after the Agreement had been enacted by 28 states, the federal government and the District of Columbia adopted the Agreement in substantially the same form. 18 U.S.C. App. § 2 (1976); Note, *The Interrelationship Between Habeas Corpus Ad Prosequendum, The Interstate Agreement on Detainers and The Speedy Trial Act of 1974: United States* v. *Mauro*, 40 Univ. Pitt. L. Rev. 285, n.3 (1978).

also deemed to waive any extradition proceedings as to all untried charges and as to any sentence that is thereafter imposed on the prisoner in the receiving state which must be served following completion of his sentence in the sending state. *N.J. Stat. Ann.* § 2A:159A-3(c). Failure of the authorities to commence trial within the 180-day period, unless excused for good cause, results in the dismissal of all untried charges. *N.J. Stat. Ann.* § 2A:159A-3(a) and 5(c)[5] When Article III is read in conjunction with Articles I and IX, and other provisions of

[5] In this case, the Third Circuit affirmed the district court's grant of a writ of *habeas corpus* to respondent Nash because the State of New Jersey failed to provide a hearing on the probation violation charge within 180 days of his request for disposition as set forth in Article III of the Detainer Agreement.

Since this Court's decision in *Cuyler* v. *Adams*, 449 U.S. 433 (1981), which established that the Agreement presents a federal question under 42 U.S.C. § 1983 (1981), the Courts of Appeals have held that the Agreement is a federal law for purposes of the *habeas corpus* statutes. 28 U.S.C. §§ 2241, 2254 and 2255 (1976). However, the courts are not in accord as to whether every violation of the Agreement will entitle a prisoner to relief in a *habeas* proceeding. Four circuits, the Third Circuit among them, relying on *United States* v. *Mauro*, 436 U.S. 340, 364-65 (1978) which established that a governmental violation of the Agreement is an absolute defense to an outstanding charge, have held that in view of the central policy of the Agreement and the sanction of mandatory dismissal, a prisoner who shows a violation of the time provisions of the Agreement presents an "exceptional circumstance" that requires *habeas* relief. *Brown* v. *Wolff*, 706 F. 2d 902 (9th Cir. 1983); *Cavallaro* v. *Wyrick*, 701 F. 2d 1273, 1275 (8th Cir.), *cert.* denied, ___ U.S. ___, 103 S. Ct. 3120 (1983); *Johnson* v. *Williams*, 666 F. 2d 842, 844 n.1 (3d Cir. 1981); *United States* v. *Williams*, 615 F. 2d 585, 590 (3d Cir. 1980); *Cody* v. *Morris*, 623 F. 2d 101, 103 (9th Cir. 1980); *Neville* v. *Cavanaugh*, 611 F. 2d 673, 676 (7th Cir. 1979) (dictum), cert. denied, 446 U.S. 908 (1980). Other circuits, injecting a harmless error standard into the Agreement, demand more than a failure to comply with the statutori-

the Agreement, it is clear that the phrase "untried indictment, information or complaint" encompasses a probation violation complaint. *N.J. Stat. Ann.* § 2A:159A-1,3,4,5 and 9.[6]

Although the starting point in every case of statutory construction is the language used by the legislature, the terms of a statute must be interpreted to effectuate the policies intended to be achieved.

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ly prescribed time requirements before relief will be granted. *Bush* v. *Muncy*, 659 F. 2d 402, 408 (4th Cir. 1981), *cert.* denied, 455 U.S. 910 (1982); *Mars* v. *United States*, 615 F. 2d 704, 707 n.9 (6th Cir.), *cert.* denied, 449 U.S. 849 (1980); *Sassoon* v. *Stynchombe*, 654 F. 2d 371, 374 (5th Cir. 1981); *Fasano* v. *Hall*, 615 F. 2d 555, 558 (1st Cir.), *cert.* denied, 449 U.S. 862 (1980); *Edwards* v. *United States*, 564 F. 2d 652, 653 (2d Cir. 1977). Since the Third Circuit takes the position that a showing of a violation is enough to entitle a prisoner to relief, this issue was not presented or argued below.

[6] Because the facts of this case involve a detainer based on a charge of probation violation, the Third Circuit specifically limited its decision to the probation violation context and held only that a "probation violation is a 'complaint' within the meaning of Article III of the IAD." *Nash* v. *Jeffes*, 739 F. 2d at 880. The court noted that the notice to the prosecutor and judge required by Article III might not inform the proper officials in the parole violation context of the prisoner's request for adjudication under a parole violation detainer. *Id.* at 883, n.11. However, the court declined to decide whether a distinction between parole and probation violation detainers is valid or would lead it to a different result. *Id.* Thus, petitioner's contention that it is "unclear" whether the Third Circuit opinion applies to parole violation detainers is without foundation. (Brief for petitioner Mercer County Prosecutor at 10, n.2) Since the issue of whether a parole violation complaint is a complaint within the scope of the Detainer Agreement was not passed on by the court of appeals and is not presented by the facts of this case, it should not be decided here. *United States* v. *Fleischman*, 339 U.S. 349, 365 (1950).

> When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as is indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature. *Brown* v. *Duchesne*, 19 How. 183, 194 (1857).

Kokoszka v. *Belford*, 417 U.S. 642, 650 (1974). The individual parts of the statute cannot be read in isolation from one another because each part derives its particular meaning from the central concept of the statute. *United States* v. *The Heirs of Boisdoré*, 49 U.S. (8 How.) 112, 121 (1850).

The explicit objective of the Interstate Agreement on Detainers is to resolve charges outstanding against a prisoner because they interfere with the prisoner's ability to participate in rehabilitative programs. *United States* v. *Mauro*, 436 U.S. 340, 347 (1978); *N.J. Stat. Ann.* § 2A:159A-1.[7] Article I, which sets forth the Agreement's purposes, applies the statute to all "charges outstanding against a prisoner" and to "detainers based on untried

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[7] Commentators agree that the adverse effects of detainers generally were the motivating force behind the drafting of the Agreement. *See generally*, Leslie W. Abramson, *Criminal Detainers*, 93 (1979); Bennett, *The Last Full Ounce*, 23 Fed. Prob. 20, 22-23 (June 1959); Bennett, *The Correctional Administrator Views Detainers*, 6 Fed. Prob. 8 (July-September 1945); Burkhart, *Interstate Cooperation in Probation and Parole*, 24 Fed. Prob. 24, 27 (June 1960); Dauber, *Reforming the Detainer System: A Case Study*, 7 Crim. L. Bull. 669, 671 (1971); Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 Crim. L. Bull. 753, 754 (1971); Yackle, *Taking Stock of Detainer Statutes*, 8 Loyola L.A. L. Rev. 88, 91-94 (1975); Note, *Convicts-The Right to Speedy Trial and the New Detainer Statutes*, 18 Rut. L. Rev. 828, 852 (1964); Note, *Detainers and the Correctional Process*, 4 Wash. U.L.Q. 417, 418-423, 429-431 (1966).

indictments, informations or complaints." *N.J. Stat. Ann.* § 2A:159A-1. Since a probation violation complaint is a "charge outstanding against a prisoner," it is a charge encompassed within Article I of the Agreement. When read in conjunction with Article I, it is evident that the phrase "untried indictment, information or complaint" as used in Article III includes within its scope a probation violation complaint.[8]

This conclusion is buttressed further by Article IX which mandates that "[t]his agreement shall be liberally

[8] One federal court, *United States* v. *Roach*, 745 F. 2d 1252 (9th Cir. 1984); four state courts of last resort, *Clipper* v. *Maryland*, 295 Md. 303, 455 A. 2d 973 (1983); *Padilla* v. *Arkansas*, 279 Ark. 100, 648 S.W. 2d 797 (1983); *State* v. *Knowles*, 275 S.C. 312, 270 S.E. 2d 133 (1980); *Suggs* v. *Hopper*, 234 Ga. 242, 215 S.E. 2d 246 (1975); and five state appellate courts, *Irby* v. *State of Missouri*, 427 So. 2d 367 (Fla. Dist. Ct. App. 1983); *People ex rel. Capalongo* v. *Howard*, 87 A.D. 2d 242, 453 N.Y.S. 2d 45 (1982); *People* v. *Jackson*, 626 P. 2d 723 (Colo. Ct. App. 1981); *Blackwell* v. *State*, 546 S.W. 2d 828 (Tenn. Crim. App. 1976); *People* v. *Batalias*, 35 A.D. 2d 740, 316 N.Y.S. 2d 245 (1970), have found that a probation violation complaint is not included within the scope of the Interstate Agreement on Detainers. None of these courts examined the legislative history of the IAD or supported their conclusions with persuasive analysis. One state appellate court, however, has found that such a complaint is within the scope of the Agreement. *Gaddy* v. *Turner*, 376 So. 2d. 1225 (Fla. Dist. Ct. App. 1979), *rev'd*, *Irby* v. *State of Missouri*, *supra*. In this matter, the Court of Appeals for the Third Circuit rested its decision upon the cogent analysis of the district court remarking that:

> Although the authority on the other side is entitled to considerable weight, the strength of the district court's analysis far exceeds that of the opinions reaching the opposite result.

Nash v. *Jeffes*, 739 F. 2d at 881. (1984). Petitioner Mercer County Prosecutor erroneously supports his argument with reference to cases dealing with parole violation detainers. *Hopper* v. *United States Parole Comm'n*, 702 F. 2d 842 (9th Cir. 1983); *Hernandez* v.

construed so as to effectuate its purposes." *N.J. Stat. Ann.* § 2A:159A-9. To give effect to Article IX a probation violation complaint must come within the scope of Article I. Any contrary construction would render the mandate in Articles I and IX meaningless. Such a result could not possibly have been within the contemplation of the legislature which sought to alleviate the adverse effects of all charges outstanding against a prisoner.[9] Con-

United States, 527 F. Supp. 83 (W.D. Okla. 1981); *Sable* v. *Ohio*, 439 F. Supp. 905 (W.D. Okla. 1977); *Cart* v. *DeRobertis*, 117 Ill. App. 3d 587, 453 N.E. 2d 153 (1983); *Maggard* v. *Wainwright*, 411 So. 2d 200 (Fla. Dist. Ct. App. 1982); *Wainwright* v. *Evans*, 403 So. 2d 1123 (Fla. Dist. Ct. App. 1981); *Buchanan* v. *Michigan Dept. of Corrections*, 50 Mich. App. 1, 212 N.W. 2d 745 (1973).

[9] Petitioners urge this Court to follow the doctrine of strict literalism and adopt a narrow, technical interpretation of the terms contained in Article III. (Brief for petitioner Mercer County Prosecutor at 11-13; Brief for petitioner New Jersey Department of Corrections at 22-24.) In advancing this argument, petitioners ignore Articles I and IX and offer no explanation for their inclusion in the Agreement. Under petitioners' statutory construction, Article III supplants Articles I and IX, whereas clearly the legislature intended all operative provisions of the Agreement to be subordinate to the latter. "The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature . . ." C.D. Sands, 2A Sutherland, *Statutes and Statutory Construction* § 46.07 (1984). Likewise, the decision in *United States* v. *Roach*, 745 F. 2d 1252 (9th Cir. 1984) is similarly flawed. There is no discussion of Articles I and IX and a complete disregard of the absurd results that a literal construction produces. (See, n. 12, *infra*.)

Courts regularly reject the doctrine of literalism when it would defeat the purpose of the legislation. Under the Uniform Criminal Extradition Act, a related subject matter area, the courts have held that a person charged with a parole or probation violation is "charged with a crime" and thus, have rejected a literal interpretation of the phrase because it would lead to an unacceptable result. *Salazar* v. *Eads*, 466 F. 2d 765 (7th Cir. 1972); *People* v. *Mallon*, 218 A.D. 461,

sequently, when the Third Circuit Court of Appeals held that the phrase "untried indictment, information or complaint" in Article III was not limited to untried criminal offenses and included probation violation complaints, it was merely giving the statutory language the plain meaning the legislature intended it to have.[10]

Other operative provisions of the Agreement compel the same conclusion. A probation violation complaint is

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218 N.Y.S. 432 (1926); Uniform Criminal Extradition Act, 11 U.L.A. 51 (Supp. 1980). In view of this broad interpretation of the phrase "charged with a crime" to include probation violation charges under the Extradition Act, the position advanced by the *Amici* Attorneys General that they are not criminal charges for purposes of the Agreement is inherently contradictory. (Brief for *Amici* Attorneys General at 18).

[10] One state, Kentucky, has amended its statute to apply to detainers based upon violations of probation and parole. *Ky. Rev. Stat* § 440.455 (1976). The amendment provides in pertinent part:

> All provisions and procedures of KRS 440.450 shall be construed to apply to any and all detainers based on unheard, undisposed of, or unresolved affidavits and warrants charging violations of the terms of probation and parole.

Ky. Rev. Stat. § 440.455(2) (1976). The amendment, however, does not indicate that a probation violation complaint was not encompassed within the Agreement originally, but rather reflects a declaration of original intent. As one court has observed:

> [The Kentucky Amendment] is simply declaratory of the intent and effect of the language of the uniform law . . . which encompasses detainers based on complaints generally as well as indictment or information.

Maggard v. *Wainwright*, 411 So. 2d at 203 (Wentworth, J., dissenting). That this is so is made evident by the fact that the notification procedures in Article III were not changed. Obviously the Kentucky legislature felt that the original language of the operative provisions of the Agreement applied both to probation and parole violation complaints. Because the language of the statute is sufficiently definitive of the scope of Article III legislative amendment is not needed.

also encompassed within the meaning of the phrase "untried indictment, information or complaint" as it is used in Articles III(c), III(e) and V(d). *N.J. Stat. Ann.* § 2A:159A-3 and 5. Article III(c) requires the warden to inform the prisoner of "any detainer" irrespective of its underlying basis and of "his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based." Since this provision omits the word "untried" and applies to all detainers, it is evident that the legislature was not espousing a strict and narrow construction of the terms "indictment, information or complaint."[11] Article III(e) compels the pris-

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[11] The development of the law has shown that the terms "untried complaint" and "trial" have never had a static meaning. A complaint, unlike an indictment or information, has an elastic definition. A complaint, for example, is defined in the *Federal Rules of Criminal Procedure* as "a written statement of the essential facts constituting the offense charged." *Fed. R. Crim. P.* 3. Since a probation violation complaint is a "written statement . . . constituting the offense charged," it is a "complaint" within the meaning of the rules and is "untried" until it has been adjudicated and a final judgment entered.

Similarly, a parallel has been drawn between a "trial" and a revocation hearing for purposes of determining the rights of an accused. *Moody* v. *Daggett*, 429 U.S. 78, 90 (1976) (Stevens, J. and Brennan, J., dissenting). Additionally, the Ninth Circuit Court of Appeals has held that the term "trial" within Article III of the Interstate Agreement on Detainers includes sentencing as well as trial on the merits. *Tinghitella* v. *State of California*, 718 F. 2d 308, 311 (9th Cir. 1983). "Both the rehabilitative and fair treatment purposes of the IAD would be better effectuated by construing trial to include sentencing. A prisoner with foreknowledge of a time certain for imprisonment in the receiving state (here, California) presumably will more easily undergo rehabilitation than one with knowledge merely of the range of possible sentences." *Id.* n. 5 at 311. *Contra*, *Gaches* v. *Third Judicial Dist.*, 416 F. Supp. 767 (W.D. Okla. 1976); *People* v. *Randolph*, 85 Misc. 2d 1022, 381 N.Y.S. 2d 192 (Sup. Ct. 1976).

oner to appear, while in the receiving State, in any Court where his presence may be "required to effectuate the purposes of the Agreement." *N.J. Stat. Ann.* § 2A:159A-3(e). Since the resolution of a probation violation complaint effectuates the purpose of the Agreement, a detainer based upon such a charge falls within the ambit of Article III(e). *Id.*

Article V(d), which establishes procedural machinery for implementing, and imposes sanctions for violating, Articles III and IV, permits prosecution in the receiving State of "*any other charge* or *charges* arising out of the same transaction" (emphasis added) that leads to filing of a detainer based upon an untried indictment, information or complaint. *N.J. Stat. Ann.* § 2A:159A-5(d). Since a probation violation complaint can arise out of the same criminal transaction that gives rise to an indictment, information or complaint, Article V comprehends probation violation charges.[12]

The interpretation of the phrase "untried indictment, information or complaint" advanced by the petitioners

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[12] Article V(d) provides:

> The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charges contained in 1 or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

Since Article V(d) includes on its face probation violation complaints, it would be ludicrous to suppose that Article III does not. Moreover, a prisoner in State A who is both indicted and charged with a probation violation complaint in State B would be entitled to dispose of the detainers on both charges. Under the petitioners' construction, a

cannot be reconciled with the clear statement that the statute applies to "all charges outstanding against a prisoner" and is primarily designed to dispose expeditiously of detainers. *N.J. Stat. Ann.* § 2A:159A-1. This position also produces anomalous results that the legislature could not have intended.[13] Because an interpretation of a statute that defeats its manifest object must defer to one that harmonizes the act as a whole, this Court must affirm the Third Circuit Court's interpretation of the statute.

B. The Legislative History Of The Interstate Agreement On Detainers Supports The Interpretation Of The Statute Adopted By The Third Circuit Court Of Appeals.

Even if the statutory language did not compel the conclusion that Article III of the Detainer Agreement includes probation violation complaints, the legislative history of the Agreement would do so. The plain meaning rule is "rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if its exists." *Boston Sand and Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928). Chief Justice Marshall long ago observed that "[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived . . ." *United States* v. *Fisher*, 6 U.S. (2 Cranch) 355, 384 (1804).

The relevant legislative history can be found in documents prepared under the auspices of the Council of State

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prisoner in State A who is charged merely with a violation of probation in State B would not be entitled to invoke the provisions of the Interstate Agreement on Detainers. A statutory construction that leads to such an anomalous result must be eschewed in favor of one that gives meaning to the parts as well as the whole. *See, American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982).

[13] *See*, n. 12, *supra*.

Governments. *United States* v. *Mauro*, 436 U.S. 340, 349-356 (1978). The federal legislative history is less instructive because "Congress enacted the Agreement into law . . . with relatively little discussion and no apparent opposition." *Id.* at 353.

In 1948, at the instance of the Parole and Probation Compact Administrators' Association, a Joint Committee on Detainers was formed to deal with the administrative problems arising from the use of detainers.[14] At the time the Committee was formed, the existing detainer system was unregulated and fraught with problems both for law enforcement officials and inmates. The cavalier filing of detainers and the bitter consequences they engendered caused one commentator to observe that "[t]he use of detainers . . . must be branded a vestigial remnant of the age-old concept of retributive justice. No purpose is served except the destructive expression of a primitive urge for vengeance." Bennett, *The Last Full Ounce*, 23 Fed. Prob. 20 (June 1959).

[14] In addition to representation from this group, the Committee included members from the National Association of Attorneys General, the Section on Criminal Law of the American Bar Association, the National Conference of Commissioners on Uniform State Laws and the American Correctional Association. In 1955 and 1956, the Committee was reconstituted under the auspices of the Council of State Governments and membership was augmented to include representation from the National Probation and Parole Association, the National Association of County and Prosecuting Attorneys and the United States Department of Justice. Council of State Governments, *Suggested State Legislation, Program for 1959*, 167 (1958).

The Joint Committee recommended the adoption of the following "guiding principles":

> I. *Every effort should be made to accomplish the disposition of detainers*[15] *as promptly as possible.* This is desirable whether the detainer has been filed against an individual who has not yet been imprisoned or against an inmate of a penal institution. Prompt disposition of detainers is a proper goal whether the detainer has been filed by a *local prosecutor, a state prison, a parole board, or a federal official.* Detainers lodged on suspicion should not be permitted to linger without action.
>
> II. There should be assurance that any prisoner released to stand trial in another jurisdiction will be returned to the institution from which he was released . . .
>
> III. *Prison and parole authorities should take prompt action to settle detainers which have been filed by them.* Prison officials and parole boards recognize that detainers create serious problems with respect to prisoners under their jurisdiction. Therefore, when such authorities file detainers against prisoners in other jurisdictions, they should cooperate fully to effect a prompt settlement of all detain-

[15] The Council defined a detainer as

> a warrant filed against a person already in custody with the purpose of insuring that he will be held for the authority which has placed the detainer. Wardens of institutions holding men who have detainers on them invariably recognize these warrants and notify the authorities placing them of the impending release of the prisoner. Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or a parolee commits a new crime and is imprisoned in another state; or where a man not previously imprisoned commits a series of crimes in different jurisdictions.

Council of State Governments, *Suggested State Legislation, Program for 1956*, 60 (1955). Such a broad definition clearly encompasses detainers based on probation violation complaints.

ers. They should promptly give notice as to whether they insist that the prisoner be returned at the end of his present sentence, or whether they will agree to a concurrent parole. Every effort should be made to cooperate in planning effective rehabilitation programs for the prisoner.

IV. *No prisoner should be penalized because of a detainer pending against him unless a thorough investigation of the detainer has been made and it has been found valid.* It should be the duty of prison officials, parole authorities and judges to make such investigations before denying the prisoner privileges, probation or parole, or before imposing unusually heavy sentences upon the prisoner.

V. All jurisdictions should observe the principles of interstate comity in the settlement of detainers, and each should bear its own proper burden of the expenses and effort involved in disposing of charges and settling detainers. There should be full faith and credit given to the rights of any state or jurisdiction asserting them.

Council of State Governments, *Suggested State Legislation, Program for 1956*, 61-62 (1955) (emphasis added). Although these principles were non-binding, they were meant to serve as a code of conduct for prosecutors, courts and prison officials "to the end that detainers [would] not hamper the administration of corrections programs and the effective rehabilitation of criminals." *Id.* at 61.

Later reconstituted under the auspices of the Council of State Governments, the Committee drafted several proposals concerning detainers. The central preoccupation of the drafters of the Agreement was the negative psychological impact of the detainer upon a prisoner and the adverse effect upon programs of prisoner treatment and rehabilitation, particularly with respect to the

impediment detainers placed upon the corrections official's ability to plan and administer these programs. The drafters perceived that the uncertainty the detainers cast over the prisoner's future undermined the incentive for self-reform and permanently embittered the offender against society. The practice of allowing a detainer to pend unresolved for a period of years reinforced the impression that society was going to "absurd lengths to inflict the maximum misery upon the prisoner." Bennett, *The Last Full Ounce*, 23 Fed. Prob. 20, 21 (June 1959) The Council observed:

> The prison administrator is thwarted in his efforts toward rehabilitation. The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment, when he is ready for return to society with an excellent possibility that he will not offend again. Instead, he often becomes embittered with continued institutionalization and the objective of the correctional system is defeated.

Council of State Governments, *Program for 1956* at 60. Thus, it was primarily to correct the adverse effects of detainers upon prisoners and corrections officials that the Agreement was drafted. *United States* v. *Mauro*, 436 U.S. at 360.[16] Since a detainer based upon a probation

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[16] The decision in *Mauro* supports this view. Writs of *habeas corpus ad prosequendum* issued by a federal court are immediately executed and, therefore, "enactment of the Agreement was not necessary to achieve their expeditious disposition." *Mauro*, 436 U.S.

violation complaint causes the same adverse effects as a detainer based upon any other charge, it is consistent with the legislative history to conclude that the drafters intended probation violation detainers to fall within the intendment of the Agreement.

Petitioners misconceive the fundamental function of the Agreement as a reform measure when they claim that the act only guards against the filing of "nuisance" detainers whose supporting charges are completely unsubstantiated. Because a probation violation detainer based upon conviction of another crime can never be frivolous, the petitioners contend that it is perfectly permissible to leave it unresolved for an infinite number of years. There is absolutely nothing in the legislative history or the Agreement itself to support this argument. The entire thrust of the guiding principles and the broad purposes expressed in Articles I and IX compel a conclusion that a probation violation complaint should be subject to a prompt resolution within the purview of the Agreement.

While the explicit purposes of the Agreement are clearly rehabilitative, it has nevertheless come to be recognized that the Agreement has collateral consequences on a prisoner's right to speedy trial. However, these consequences were not the primary focus of the act; they cannot be invoked to thwart the legislative intent and exclude detainers based upon probation violation complaints from the protections conferred by the Agreement. In 1957, "when the detainer statute was drafted and first published, a prison inmate's constitutional right to a speedy trial had not yet been clearly established." Yack-

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at 360. "The adverse effects of detainers that prompted the drafting and enactment of the Agreement are thus for the most part the consequence of the lengthy duration of detainers." 436 U.S. at 360.

le, *Taking Stock of Detainer Statutes*, 8 Loyola L.A. L. Rev. 88, 110 (1975). At that time, "the problems associated with detainers were seen as administrative, involving substantial difficulties for inmates but not rising to constitutional significance." *Id.* at 110. The petitioners' thesis that the Agreement was designed to effectuate speedy trial rights misreads the legislative history. Therefore, petitioners' argument that the provisions do not extend to probation violation complaints because they do not implicate speedy trial rights must fail.

Although it is obvious that the enactment of the statute by the federal government directly followed this Court's decisions in *Klopfer* v. *North Carolina*, 386 U.S. 214 (1967) and *Smith* v. *Hooey*, 393 U.S. 374 (1969), Congress did not enact the statute, as the legislative history shows, solely to protect speedy trial rights. In 1970, when the federal government and the District of Columbia adopted the Agreement both the House and Senate Reports stated that:

> *The Attorney General has advised the committee that a prisoner who has had a detainer lodged against him is seriously disadvantaged by such action.* He is in custody and therefore in no position to seek witnesses or to preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. What is more, when detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing. Although a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence, the damage to the rehabilitation program has been done because the institution staff has not had sufficient time to

develop a sound pre-release program. (emphasis added)

S. Rep. No. 91-1356, 91st Cong. 2nd Sess.; H.R. Rep. No. 91-1018, 91st Cong. 2nd Sess. reported in 1970 U.S. Code Cong. & Ad. News 4864, 4866. As this Court has stated "[t]he reference in the Committee Reports to the recommendations of the Attorney General . . . indicates that Congress was motivated, not only by the desire to aid States in obtaining federal prisoners, but also by the desire to alleviate the problems encountered by prisoners and prison systems as a result of the lodging of detainers." *United States* v. *Mauro*, 436 U.S. at 356.[17]

In the discussion leading to passage of the Agreement in the House of Representatives, a sponsor of the bill, Richard H. Poff from the State of Virginia, remarked:

> . . . if a defendant is uncertain as to whether he will have to serve another jail term he is less likely to have the motivation to become successfully rehabilitated. *This latter consideration is especially important in view of the fact that the basic purpose of the entire penal system is to prepare its inmates to reenter society as law-abiding citizens.* (emphasis added)

H.R. 6951, 91st Cong., 2nd Sess., 116 Cong. Rec. 13997, 14000 (1970). Representative Poff concluded ". . . in view of these considerations, I feel that the Interstate Agreement on Detainers benefits both defendant and prosecutor, as well as society generally." *Id.* As the above discussion of the legislative history reveals Congress was well aware of the drafters' primary purpose to alleviate the adverse effects of detainers, while simultaneously recognizing the potential of the statute to have some impact upon effectuating a prisoner's right to speedy trial.

The Third Circuit Court of Appeals deduced from the legislative history that the "drafters of Article III were concerned with the need to settle outstanding charges against prisoners in order to enable the prisoners to participate in rehabilitation programs." *Nash* v. *Jeffes*, 739 F. 2d at 882. The Agreement was primarily designed to safeguard prisoner rights and it is totally consistent with legislative intent to construe the Agreement to apply Article III to detainers based upon probation violation complaints. Contrary to petitioners' assertion, the Third Circuit Court of Appeals did not legislate new policy, but merely carried out the intent expressed in the statutory language and legislative history.

C. Application Of Article III To Probation Violation Complaints Effectuates The Legislative Policies Of The Detainer Agreement.

Petitioners claim that application of Article III to probation violation detainers does not result in any of the benefits the legislature intended the Agreement to have because of the nature of the probation violation charge.

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[17] A further indication that Congress did not view the Agreement as a mechanism designed primarily to protect a defendant's right to a speedy trial is the passage of the *Speedy Trial Act of 1974*, 18 U.S.C.A. § 3161(j) (West Supp. 1984). This Act places an affirmative obligation upon the United States Attorney to take steps promptly to obtain a prisoner for trial once he learns of his place of incarceration and thereby rectifies what commentators had long recognized to be a significant weakness of the Agreement's ability to implement speedy trial rights. See also the ABA Report on Standards for Criminal Justice, *Standards Relating to Speedy Trial* § 3.1 (1967) which places the same burden on the prosecutor.

It is clear, therefore, that to the extent the Agreement applies to detainers based on all charges it accords defendants rights greater than those afforded by the speedy trial guarantee of the Constitution. On the other hand, because the Agreement does not require a prosecutor to file a detainer, its speedy trial protections are inadequate.

To arrive at this conclusion petitioners wrongly assert that each and every possible disposition of a probation violation detainer will have no beneficial effect upon the prisoner and the administration of correctional programs. However, as the Third Circuit Court of Appeals correctly observed "[a] quick adjudication of the charges underlying a detainer is desirable, not only to vindicate a prisoner's constitutional right to a speedy trial, but also to provide certainty as to the time of his scheduled release, in order to aid in his rehabilitation." *Nash* v. *Jeffes*, 739 F. 2d at 883.

Restrictions are placed upon inmates against whom a detainer is lodged under the assumption that they pose a greater escape risk than other inmates since they face the possibility of serving a future sentence of unknown duration. Note, *Detainers and the Correctional Process*, 4 Wash. U.L.Q. 417, 419 (1966). These restrictions are placed upon inmates routinely and regardless of the nature of the charge underlying the detainer. *Id.* at 419. The presence of the detainer generates uncertainty about the prisoner's future by leaving unresolved the terms of any future sentence that may eventually be imposed. This uncertainty affects both prisoner and corrections official alike. The former suffers the anxiety and depression from the threat of having to serve a consecutive term; the latter the inability to design a program of effective treatment not knowing the prisoner's certain release date. To ascertain the release date at the most efficacious time, ". . . charges underlying detainers [should] be finally adjudicated at the beginning, rather than the end, of the sentence." *Nash* v. *Jeffes*, 739 F. 2d at 883.

Resolution of detainers based upon probation violation complaints fulfills the beneficial aims of the act. A court exercises a wide latitude of discretion at a probation

revocation proceeding; indeed, the court may elect not to revoke probation, or to impose any sentence that could have been imposed at the original time of sentencing. *N.J. Stat. Ann.* § 2C:44-5(c). Although conviction of a crime while on probation raises a presumption that probation will be revoked, it does not restrict the court's discretion. *State* v. *Serio*, 168 N.J. Super. 394, 403 A. 2d 49 (Super. Ct. Law Div. 1979). Where the new conviction is for a minor offense revocation may not be warranted. Abramson, *Criminal Detainers*, 86 (1979). Moreover, the court is at liberty to impose either concurrent or consecutive sentences. *N.J. Stat. Ann.* § 2C:45-3(b). Should a concurrent sentence be imposed it would alleviate the restrictions placed upon the inmate.[18]

Early adjudication of the charge also enables the court to base its decision on fresh evidence. Not all probation violation detainers will be based upon the out-of-state conviction.[19] Cases involving technical charges of non-

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[18] The New Jersey Department of Corrections Standard relating to eligibility criteria for reduced custody consideration provides:

D. Detainers, Open Charges Bail

A detainer is a warrant for formal authorization to hold an inmate for prosecution or detention by federal, state or out-of-state law enforcement agencies.

Inmates, with detainers from federal authorities or other states shall be eligible to be considered for gang minimum and full minimum custody status, *provided* the detainers are for concurrent sentences which do not exceed the maximum of the term currently being served.

N.J. Dep't of Corrections, Standard 853.5D (April 11, 1983).

[19] Detainers of this sort are not uncommonly placed. *See, e.g. Padilla* v. *State of Arkansas*, 279 Ark. 100, 648 S.W. 2d 797 (1983). While Padilla was serving a sentence in California for an unrelated crime, Arkansas placed a detainer against him based upon an alleged failure to report to his probation officer. The petitioners' reliance upon *Padilla* ironically disproves their thesis that a detainer based upon a technical violation is unlikely to be encountered.

compliance with the terms of probation may require the testimony of live witnesses. A delay in the proceeding resuits in the fading of memories, loss of witnesses, or essential evidence, exactly the same concerns that underlie a prisoner's constitutional right to a speedy trial, and thereby deprives the inmate of an effective defense when the hearing is held at a later date. The Third Circuit found this distinct possibility serious enough to warrant speedy disposition. *Nash* v. *Jeffes*, 739 F. 2d at 882.[20]

In the probation violation setting, delay in disposition forces a consecutive sentence and offers no benefits to either the prisoner or the State. Since there is no mechanism by which to apply the sentence on the probation violation retroactively, if the Agreement is held not to apply to probation violation complaints, a judge would never be able to impose concurrent sentences and the prisoner would be denied the ensuing benefit. The State that lodges the detainer would incur the expense of incarcerating the prisoner for the additional term. The State that has custody of the prisoner while the detainer

[20] Petitioner Department of Corrections distorts the Third Circuit opinion when it asserts that the Circuit Court "acknowledged" that a prisoner's interest in an early adjudication does not "outweigh the administrative burden and expense to the state in conducting the revocation hearing prior to completion of the out-of-state sentence." (Brief for petitioner Department of Corrections at 27). All the court did was to note that conviction of a new crime is *prima facie* proof of the probation violation. It made no suggestion that this type of violation should preclude a prisoner from an early adjudication of the detainer because of the administrative burden and expense to the State. To the contrary, the Court stated that the cost of an additional trip, given the burdens the detainer placed on the prisoner, did not outweigh the prisoner's interest in quick adjudication irrespective of the nature of the probation violation. *Nash* v. *Jeffes*, 739 F. 2d at 883.

is pending would bear the additional expense of keeping the prisoner in its maximum security facility since prisoners with detainers lodged against them are perceived as escape risks.

The supposed advantage to delay, that of affording a more informed decision to be made at the revocation hearing based upon the inmate's record of progress, is simply not attainable in the interstate setting. *Cf. Moody* v. *Daggett*, 429 U.S. 78, 89 (1976).[21] A court sitting in a jurisdiction other than the one where the prisoner is incarcerated is not in a position to follow the inmate's

[21] Although this Court has determined that a prisoner does not have a constitutional right to a prompt parole violation hearing in the intrastate setting, *Moody* v. *Daggett*, 429 U.S. 78 (1976), and several lower courts have determined that this right does not exist in the interstate setting when different and autonomous parole authorities are involved, *United States ex rel. Caruso* v. *United States Board of Parole*, 570 F. 2d 1150 (3rd Cir. 1978), *cert.* denied, 436 U.S. 911 (1978), it does not follow that a prisoner neither has a constitutional right to a prompt probation revocation hearing in the interstate setting, nor a statutory right to one under the Agreement. In *Moody*, this Court expressly reserved the determination of whether the potential of adverse actions by different and autonomous parole boards would warrant a different conclusion, and this possibility remains distinctly open in spite of lower court rulings. 429 U.S. at 88. Additionally, no lower court has made a specific determination as to whether a constitutional right to a prompt probation violation hearing would be recognized in the interstate setting since probation raises concerns that are not present in parole violation proceedings. Moreover, statutes may always confer greater rights upon individuals than those that are recognized under the federal or state constitutions which merely reflect the bare minimum level of rights accorded to all. *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974). In this respect, the Agreement gives effect to the legislatively created right to serve a prison sentence unencumbered by the adverse effects of detainers.

progress at the institution and, therefore, not in a position to make a more informed decision about revocation at the end of the outside term. Rather, the delay deprives the court of the opportunity to integrate its sentence with that of the other jurisdiction and, thus, directly contravenes the intent of the drafters. Council of State Governments, *Program for 1956* at 60.

In the interstate setting, delay hinders rather than furthers any legitimate state interest. It creates a backlog of cases and promotes a system of deciding cases on the basis of stale evidence. It is not even clear that the cost of the "return trip," which would be incurred by the State if the Agreement is interpreted to apply to probation violation detainers, exceeds the cost of delaying the hearing until the expiration of the intervening sentence. Because the operative provisions of the Agreement can be so readily applied to dispose of detainers based on charges of probation violation, applying the Agreement to probation violation detainers would not impose any significant administrative or financial burdens upon the State.[22]

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[22] Article III requires a prisoner to deliver his demand for final disposition of the charge underlying the detainer to "the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction." *N.J. Stat. Ann.* § 2A:159A-3(a). This notice requirement correctly informs those with jurisdiction over a probation violation complaint of the prisoner's request for final disposition of the detainer.

In 1970, the Center for Criminal Justice at Harvard Law School undertook a detailed study of the detainer system at four major prisons of the Commonwealth of Massachusetts. Dauber, *Reforming the Detainer System: A Case Study*, 7 Crim. L. Bull. 669, 673 (1971). Approximately 10 percent of the records of all inmates in those prisons were reviewed and analyzed. *Id.* at 673. It was found that of the 202 inmates studied in the sample population, a total of 108 detainers had been lodged against them at some time during their present incarceration. *Id.* at 675. It was further found that only 19 percent (21 detainers) of the total number of detainers in the sample were based on parole and probation violation charges. *Id.* at 676. This figure represented the smallest percentage of detainers identified by the Center's study with the exception of those detainers grouped in the "miscellaneous" category. The results of this study, the first and apparently only empirical study of the detainer system, contrast sharply with and suggest that the estimate of the *Amici* Attorneys General that a significant number of the 27,177 persons wanted nationally for probation violations are likely to be inmates against whom probation violation detainers are pending is grossly mistaken. (Brief for *Amici* Attorneys General at p. 6)

The Third Circuit Court of Appeals correctly rejected a narrow and technical interpretation of the Agreement. In so doing, the Court avoided a construction of the statute that would defeat the very purposes for which it was enacted. By adopting an interpretation that fulfills the statute's aims, the Court properly met its judicial responsibilities to effectuate legislative intent.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF NEW JERSEY,
Department of Corrections,
Petitioner,

v.

RICHARD NASH,
Respondent.

PHILIP A. CARCHMAN,
Mercer County Prosecutor,
Petitioner,

v.

RICHARD NASH,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW POST-CONVICTION ASSISTANCE PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW POST-CONVICTION ASSISTANCE PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed pursuant to Rule 36.2 of this Court. Consent to file has been granted by James J. Ciancia, Esq., Assistant Attorney General for the State of New Jersey, Counsel for Petitioner in No. 84-835, by Philip S. Carchman, Esq., Mercer County Prosecutor, Counsel for Petitioner in No. 84-776 and by John Burke, Esq., Assistant Deputy Public Defender for the State of New Jersey, Counsel for Respondent.

INTEREST OF THE AMICUS CURIAE

The Post-Conviction Assistance Project (P-CAP) is a Virginia nonprofit corporation organized and staffed by student volunteers at the University of Virginia School of Law. Since its establishment in 1971, P-CAP has advocated respect for the often ignored rights of those confined in our nation's prisons. Despite waning student concern for public interest law and budgetary constraints that severely limit such efforts, P-CAP members interview arrestees daily in preparation for bail hearings, help prisoners with problems navigate the corrections bureaucracy, visit youths at a local juvenile home, and answer requests for legal materials from pro se inmate litigants. Pursuant to third-year practice rules, P-CAP members represent prisoners in federal habeas corpus and civil rights suits before Uni-

ted States District Courts and the United States Court of Appeals for the Fourth Circuit.

P-CAP receives its funding from the University of Virginia Law School Foundation, from the University of Virginia Student Council, and from private donations. It has no financial interest in the outcome of this case.

P-CAP's interest as amicus curiae arises from its experience working with inmates from all over the country. This experience has made P-CAP aware of the harm detainers do to inmate rehabilitation and of the benefits that the Interstate Agreement on Detainers (IAD) has produced for inmates and society at large. Prompt disposition of detainers under the IAD encourages effective rehabilitation and fair resolution of the warrants underlying detainers. The concern of the amicus

curiae is that IAD be interpreted in accord with legislative policy to provide for prompt resolution of all major types of detainers.

1984-85 Board of Directors
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SUMMARY OF ARGUMENT

A state is never compelled to place a detainer on an inmate. If a state wishes to obtain custody of an inmate without placing a detainer it may do so via the

extradition process. Detainers impose a severe burden on inmates' and society's interests in rehabilitation -- a burden that the Interstate Agreement on Detainers (IAD) is designed to reduce. When a state chooses to damage rehabilitation by placing a detainer, then the detainer should be subject to the IAD, so that the harm may be mitigated in accordance with legislative design.

Applying the IAD to parole and probation detainers will result in some additional costs for the states. However, probation and parole detainers burden rehabilitation in exactly the same way detainers based on criminal indictments do. Both classes of detainers, identical in effect, should be subject to the same rules. In that way, a state will not be encouraged to place parole and probation detainers that it never intends to prosecute, thereby pun-

ishing an inmate at the expense of society and a sister state.

Of course, a state may avoid the costs of the detainer system entirely by not filing a detainer. Furthermore, few prisoners are likely to take advantage of the opportunity to have prompt revocation hearings, because it will often be to a prisoner's advantage to delay a decision.

Prompt disposition of parole and probation violation detainers serves the purposes of the IAD. And the cost objections raised to applying the IAD to these detainers are not substantial. Therefore, it is highly unlikely that the drafters of the IAD and the legislators who enacted it meant to exclude parole and probation violation detainers from the IAD's mechanisms. The Court of Appeals correctly found, consistent with legislatively-established policies, that the general lan-

guage of the IAD should be interpreted to place probation and parole detainers within the mechanism of the IAD's Article III. Nash v. Jeffes, 739 F.2d 878 (3d Cir. 1984), cert. granted, 105 S. Ct. 902 (1985).

ARGUMENT

I. THE BROAD LANGUAGE OF THE INTERSTATE AGREEMENT ON DETAINERS INCLUDES PAROLE AND PROBATION VIOLATION DETAINERS.

The Interstate Agreement on Detainers, N.J. Rev. Stat. §§ 2A:159A-1 to -9 (1971), (hereinafter the IAD or the Agreement) was drafted in 1956 by the Committee on Detainers and Sentencing and Release of Persons Accused of Multiple Offenses. The committee met under the auspices of the Council of State Governments. See Council of State Governments, Suggested State Legislative Program for 1957, at 74-85 (1956). The Agreement was the culmination

of a process that began eight years before, when the Joint Committee on Detainers, the forerunner of the committee that drafted the IAD, first met and began searching for a way to reduce the harm to society and to prisoners caused by detainers' interference with rehabilitation. See Council of State Governments, The Handbook of Interstate Crime Control 85-91 (1949). With this Court's decision in Smith v. Hooey, 393 U.S. 374 (1969), establishing constitutional speedy trial rights for state prisoners serving time for other crimes, the IAD began to serve the purpose of protecting prisoners' constitutional right to a speedy trial.

The committee that drafted the IAD was faced with a serious problem. The evils of the detainer system had received substantial attention, but it was apparent that voluntary cooperation between the

states was not effective in controlling abuse in the system. See Council of State Governments, Suggested State Legislative Program for 1957, at 74-76. The committee met only four times, twice in 1955 and twice in 1956. Id. They produced an imperfectly drafted statute. As this Court observed when it decided United States v. Mauro, 436 U.S. 340 (1977), the drafters even neglected to define the word "detainer." Nevertheless, the drafters achieved a balance of fairness between the interests of prisoners and society in rapid disposition of charges and the need for a manageable and efficient system for interjurisdictional transfers of inmates.

The language of the IAD sheds limited light on whether Article III of the Agreement was meant to cover detainers based on

parole and probation violations.[1] Article I states:

> The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints ... produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints.

N.J. Rev. Stat. § 2A:159A-1 (1971) (emphasis added). Article III repeats this language in a slightly different form: "[W]henever during the continuance

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[1]The Court of Appeals did not consider the issue of whether a parole violation detainer should be subject to the IAD. Nash v. Jeffes, 739 F.2d 878, 883 n.11 (3d Cir. 1984). However, this Court, in granting the writ of certiorari, indicated an intention to address this issue. 105 S. Ct. 902 (1985). Accordingly, amicus curiae will address both probation and parole violation detainers.

of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days [of completing proper notice procedures]." N.J. Rev. Stat. § 2A:159A-3 (1971). Whether this language includes parole and probation violation detainers is not immediately clear without reference to the legislatively-established purposes of the IAD.

Nevertheless, the above-emphasized language from Article I, using the word "charges" to describe the scope of the Agreement, would seem to encompass parole and probation violation detainers. Article III, in dropping that language, might be seen as inexplicably narrowing the kinds of detainers meant to be encom-

passed by the IAD. However, since the language is unclear, consideration of the legislative purposes of the Agreement indicates that the language of Article I shall control. Nash v. Carchman, 558 F. Supp. 641, 644 (D.N.J. 1983), aff'd sub nom. Nash v. Jeffes, 739 F.2d 878 (3d Cir. 1984), cert. granted, 105 S. Ct. 902 (1985). Article IX of the Agreement mandates that courts interpret the IAD "so as to effectuate its purposes." N.J. Rev. Stat. § 2A:159A-9 (1971). Those purposes are laid out in the language of Article I, demonstrating that the drafters intended that language to control questions of the IAD's interpretation.

The legislative history of the IAD supports the view that parole and probation violation detainers are subject to the provisions of Article III. The Council of

State Governments' description of the IAD includes a definition of the word detainer which explicitly includes parole violation detainers:

> A detainer may be defined as a warrant filed against a person already in custody with the purpose of insuring that he will be available to the authority which has placed the detainer. ... Such detainers may be placed by various authorities under varying conditions, for example, when an escaped prisoner or a parolee commits a new crime and is imprisoned in another state.

Council of State Governments, Suggested State Legislative Program for 1957, at 74 (emphasis added).

To look at the question from another angle, reading the language "indictment, information or complaint" as strictly limiting the application of Article III produces unsatisfactory results. In Virginia, for example, a grand jury is entitled to indict an individual of its own

accord, without the participation of the prosecutor. Va. Code § 19.2-216 (1983). This form of process is called a "presentment." A strict reading of this language would exclude detainers based on presentments from the mechanism of Article III, although such detainers, like those based on probation and parole violations, are plainly within the legislative rationale for the Agreement.

Equally unsuitable results will occur if the words "untried" and "trial" from Article III are read to support the inference that only detainers based on criminal charges are covered by Article III. For example, under this reading a prisoner who used the IAD to clear an outstanding charge and then was diverted from trial with the opportunity of having the charges dropped in the future might later attack the charge by arguing that the IAD re-

quired that he be brought to trial. Again, Article I helps with this problem by speaking more accurately of the "disposition" of outstanding charges.

Even if the language "indictment, information or complaint" is read to somehow narrow the applicability of Article III, it is itself broad enough to encompass parole and probation violation detainers. The words indictment and information have well-understood, technical meanings. The word complaint, however, has a broader meaning. Nash v. Carchman, 558 F. Supp. at 643-44. It is part of our everyday vocabulary as a generic term for all kinds of criminal charges.

II. THE LEGISLATIVE HISTORY AND PURPOSES OF THE IAD DEMONSTRATE THAT PAROLE AND PROBATION VIOLATION DETAINERS ARE SUBJECT TO ARTICLE III.

As the Court of Appeals in this case pointed out, the courts that have reached

the conclusion that parole and probation violation detainers are not subject to Article III of the Agreement did not give adequate consideration to the legislatively-mandated purposes of the IAD. Nash v. Jeffes, 739 F.2d 878, 882 (3d Cir. 1984), cert. granted, 105 S. Ct. 902 (1985).[2] These decisions are in direct contrast to the approach this court has previously taken in IAD cases. In both Cuyler v. Adams, 449 U.S. 433 (1981), and United States v. Mauro, 436 U.S. 340

[2]An example of the overly narrow approach criticized by the court in Nash occurs in United States v. Roach, 745 F.2d 1252, 1253 (9th Cir. 1984). The court in Roach refused to look at the legislative history of the IAD, although this Court has stated "[w]hen aid to construction of the meaning words, as used in the statue, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543-44 (1940).

(1978), this Court conducted an "analysis of the purposes of the agreement and the reasons for its adoption" before reaching a decision. See Cuyler, 449 U.S. at 447-50; Mauro, 436 U.S. at 349-50, 359-61.[3]

[3]Cuyler v. Adams, 449 U.S. 433 (1981), held that the IAD presents a federal question under 42 U.S.C. §§ 1981, 1983 (1982). This court has not addressed the issue of whether federal habeas corpus relief under 28 U.S.C. § 2254 (1982) is available for Article III violations. Amicus curiae believes that such relief should be available. However, there is considerable division of opinion among the courts of appeals on the extent of federal habeas corpus relief available for IAD violations. For illustrative cases see Hopper v. United States Parole Comm'n, 702 F.2d 842, 846 n.3 (9th Cir. 1983) (relief available under 28 U.S.C. §§ 2241, 2254, 2255 (1982) for violations of Article III(a)); Cavallaro v. Wyrick, 701 F.2d 1273, 1275 (8th Cir.), cert. denied, 103 S. Ct. 3120 (1983) (relief available under § 2241 for failure to provide a pre-transfer hearing after an Article IV request); Johnson v. Williams, 666 F.2d 842, 844 n.1 (3d Cir. 1981) (relief available under § 2254 for violations of Article IV(e)); Bush v. Muncy, 659 F.2d 402, 409 (4th Cir. 1981), cert. denied, 455 U.S. 910 (1982) (relief not available under § 2254 for violations of Article IV(e)); Cody v. Morris, 623 F.2d 101, 103 (9th Cir. 1980)

A. The IAD Is Designed to Protect Society's and Inmates' Interests in Rehabilitation.

The primary purpose of the IAD, as stated in Article I, is to promote both society's and prisoners' interests in rehabilitation by providing an efficient mechanism for the disposition of outstand-

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[3] (cont'd) (relief available under § 2254 for violations of Article IV(c)); Fasano v. Hall, 615 F.2d 555, 558 (1st Cir.), cert. denied, 449 U.S. 867 (1980) (no relief available for IAD violations); Mars v. United States, 615 F.2d 704, 707 (6th Cir.), cert. denied, 449 U.S. 849 (1980) (relief not available under § 2255 for violations of Article IV (e)); United States v. Williams, 615 F.2d 585, 589-90 (3d Cir. 1980) (relief available under § 2255 for violations of article IV(e)); Hitchcock v. United States, 580 F.2d 964, 966 (9th Cir. 1978) (relief not available under § 2255 for violations of Article IV(e)); Echevarria v. Bell, 579 F.2d 1022, 1024-25 (7th Cir. 1978) (relief available under § 2254 for violations of Article IV(e)); Edwards v. United States, 564 F.2d 652, 653 (2d Cir. 1977) (relief not available under § 2255 for violations of Article IV(e)).

ing charges.[4] The legislative history of the Agreement conclusively establishes this purpose. The commentary accompanying the promulgation of the IAD by the Council of State Governments describes the evils of the detainer system:

> The prison administrator is thwarted in his efforts toward rehabilitation. The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as

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[4] The IAD is not a statute designed to protect the constitutional right to a speedy trial. This Court's decision in Smith v. Hooey, 393 U.S. 374 (1969), played a role in the congressional ratification of the Agreement, but as this section demonstrates, the Congress was equally concerned with rehabilitation. There is no indication whatsoever that the statute was drafted with constitutional speedy trial considerations in mind. The drafting took place twenty years before constitutional speedy trial rights were extended to prisoners of the states. The IAD's usefulness in protecting speedy trial rights is a product of historical accident, not legislative design.

> trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment .... Instead, he often becomes embittered with continued institutionalization and the objective of the correction system is defeated.
> ....
> ... Ironically, society is the real loser in collecting its debt from the offender. Much money is spent in extra periods of imprisonment, and embittered offenders become recidivists, pyramiding the expense of law enforcement.

Council of State Governments, Suggested State Legislative Program for 1957, at 74.

Congress was also worried about the harm to rehabilitation as it considered the IAD. Two examples from the House of Representatives and Senate committee reports will suffice to demonstrate the congressional concern. (The reports are virtually identical.) The reports state, under the heading "The Need for the Legislation," that "[a]lthough a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence, the damage to the rehabilitation program has been done because the institution staff has not had sufficient time to develop a sound prerelease program." H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. 3 (1970); S. Rep. No. 91-1356, 91st Cong., 2d Sess. 3 (1970). A letter from Graham W. Watt of the Government of the District of Columbia included in both reports and urging ratification of the IAD explains:

> There is substantial agreement among prison authorities that the presence of outstanding detainers has an adverse psychological effect upon prisoners and substantially impedes the establishment of any meaningful rehabilitative program for them. Not only do prisoners against whom detainers have been lodged present greater behavioral and security problems, but the planning of any realistic treatment program involving parole, work release, training, continuing

> education, or other community-oriented activities becomes difficult, if not impossible.

H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. 7 (1970); S. Rep. No. 91-1356, 91st Cong., 2d Sess. 7 (1970). See also H.R. Rep. at 5; S. Rep. at 5 (letter from Deputy Attorney General Kleindienst).

B. Parole and Probation Violation Detainers Severely Damage Rehabilitation Efforts.

The legislative history demonstrates that the purpose of the IAD is to reduce detainers' destructive effects on rehabilitation. The harm to rehabilitation is caused by the severe deprivations an outstanding detainer visits upon an inmate:

> [T]he inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons. . . .; (4) ineligible for

> trustee status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle them to additional good time credits against their sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.

Cooper v. Lockhart, 489 F.2d 308, 314 n.10 (8th Cir. 1973). These hardships are identical for detainers based on parole and probation violations and for those based on outstanding criminal indictments. L. Abramson, Criminal Detainers 85 (1979). Therefore, the harm to rehabilitation

caused by both classes of detainers is identical.

Since the purpose of the IAD is to mitigate the adverse effects of outstanding detainers on rehabilitation, and since the effects on rehabilitation of outstanding parole and probation violation detainers are identical to the effects of outstanding criminal indictment detainers, it is highly improbable that the drafters would have excluded parole and probation violation detainers from the mechanisms of the IAD.

C. There Is No Persuasive Justification for Excluding Probation and Parole Violation Detainers from the Mechanisms of the IAD.

The commonly advanced rationales for excluding parole and probation violation detainers from the provisions of the IAD are not convincing. There are two points to be kept in mind as these arguments are

examined. First, the IAD is a two-way street. It gives the prisoner a way to compel the state to provide for disposition of charges underlying a detainer, but under Article IV it also provides the state with a streamlined procedure for obtaining custody of the prisoner if it so desires. N.J. Rev. Stat. § 24:159A-4 (1971). In IAD cases the temptation is to focus too closely on the benefit that the Agreement provides to prisoners, and to lose sight of the benefits provided to states by efficient mechanisms for disposing of detainers and to society by more effective use of resources devoted to corrections.

Second, the state is never required to lodge a detainer against a prisoner. The state may obtain a parole or probation violator through the normal extradition process if it wishes to avoid the oper-

·tion of the IAD. See N.J. Rev. Stat. § 2A:160-32 (1971). When a state places a detainer, it is aware of the severe consequences it will have for the inmate. It is fair that the state should then be subject to the IAD, which is designed to mitigate those consequences. This is particularly true when the state has another way to obtain custody of the inmate which avoids those consequences. As a Florida court pointed out in applying the IAD to a probation violation detainer, "[I]t is paradoxical for the State to attempt to utilize a detainer to insure Gaddy's presence following completion of his Georgia sentence, but to contend that it need not comply with procedural requirements imposed by the Detainers Act." Gaddy v. Turner, 376 So. 2d 1225, 1228 (Fla. Dist. Ct. App. 1979).

The primary objection raised by the State in this case is that including parole and probation detainers under the IAD will result in increased costs. The obvious response is to repeat that the State need not file a detainer at all, and may avoid any costs imposed by the IAD. If the state chooses to burden prisoners with detainers, it should bear the minor increase in administrative costs of keeping a closer watch on the detainer's status.

The objection, however, seems not to be to administrative costs, but to the increased costs of transporting prisoners to the jurisdiction in order to have hearings. That argument is flawed, unless a state never intends to pursue adjudication of the charges underlying these detainers. If a State is serious about pursuing a parole or probation violation charge, the

cost of bringing the prisoner to the jurisdiction must be paid.

If the prisoner requests disposition, a state must pay the cost of returning the prisoner after his hearing. That cost should be considered the "price" of placing a detainer. From the standpoint of the legislatively-established purpose of avoiding harm to rehabilitation, there is no distinction between parole and probation violation detainers and criminal indictment detainers. When a state chooses to place either type of detainer on an inmate, that state should bear an identical cost burden, since that state has imposed an identical burden on rehabilitation.

Applying the IAD to parole and probation violation detainers further prevents harm to rehabilitation by discouraging the filing of frivolous detainers. Raising

the cost issue is a way for the State to attempt to justify the abusive practice of placing detainers in order to punish the prisoner, and then withdrawing the detainer before having to bear the cost of bringing the prisoner to the jurisdiction for the hearings required by the due process clause of the Constitution. In this way the a State can punish an inmate for a parole or probation violation without ever having to provide or pay for the due process protections constitutionally mandated by this Court's decisions in Gagnon v. Scarpelli, 411 U.S. 778 (1973) and Morrissey v. Brewer, 408 U.S. 471 (1972).

That this abuse occurs regularly cannot be doubted. The legislative history of the IAD before the Congress points out that most state detainers placed on federal prisoners are withdrawn just before the federal sentence is completed.

H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. 3 (1970); S. Rep. No. 91-1356, 91st Cong., 2d Sess. 3 (1970). Evidence of this abuse is present throughout the IAD literature. As one article states, "[m]any detainers are filed for punitive reasons and are later withdrawn or not enforced, having served their purpose by curtailing prison privileges and preventing parole." Jacob & Sharma, Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correction Process, 18 U. Kan. L. Rev. 494, 582 (1970); see also 11 Uniform Laws Annotated 322 (1968).

In any case, it is not likely that prisoners will flock to take advantage of the provisions of Article III if they are held applicable to parole and probation violations, so costs should not rise substantially. In the first place, in most

cases the conviction for which the prisoner is serving a sentence will be conclusive proof of the violation, so the prisoner may wait and hope the detainer is withdrawn. See Morrissey v. Brewer, 408 U.S. 471, 490 (1972). Furthermore, since an excellent institutional record is a valuable piece of evidence for the prisoner in his hearing, he may wish to wait if he feels his chance of avoiding revocation will be better after compiling such a record. Moody v. Daggett, 429 U.S. 78, 89 (1976). It will not be a substantial burden on the states to afford prompt hearings to those few prisoners who wish to try to settle the violation in order to have a better idea of when they might be released, or who feel they have a chance for imposition of a concurrent sentence.

While the amicus curiae have argued that both parole and probation violation de-

tainers are subject to the mechanism of Article III, there is an additional administrative cost associated with subjecting parole detainers to the IAD. Article III requires that notice be provided to the court and the prosecutor of a request for disposition of charges underlying a detainer. Parole charges are generally handled by state parole boards, so the notice requirements of the statute would require a state to provide a mechanism for transmitting notice to the appropriate authorities. That is not an overwhelming difficulty, however. For instance, Virginia law already requires that a Commonwealth's Attorney and Circuit Court become involved in parole revocations any time an attorney is appointed to represent the violator. Va. Code Ann. § 53.1-165 (1982).

A state is never required to place a detainer. However, if it chooses to burden an inmate with the penalties a detainer brings with it, then it should not begrudge the inmate the opportunity to dispose of the detainer by facing the underlying charges. In applying the IAD to parole and probation violation detainers, this Court would place no significant burdens on the states and would allow prisoners, if they so desire, promptly to face justice. The result benefits not only inmates, but also society, by protecting the opportunities for rehabilitation. It is difficult to believe that under these circumstances the drafters of the IAD and the legislators who enacted it could have meant to exclude parole and probation detainers from the mechanisms of the Agreement.

CONCLUSION

For the foregoing reasons, amicus curiae believes that this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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